Petitions for writ of error are heard

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~388.~~ 340 91

FRANK R. OSBORNE, AGENT SOUTHERN EXPRESS COMPANY,

vs.

THE MAYOR, ALDERMEN, AND COMMON COUNCIL OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MAY 10, 1871

Dec 7. 1872

SUPREME COURT OF THE UNITED STATES.

No. 538.

FRANK R. OSBORNE, AGENT SOUTHERN EXPRESS COMPANY,

vs.

THE MAYOR, ALDERMEN, AND COMMON COUNCIL OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 Be it remembered that a regular term of the supreme court of Alabama was begun and held, according to law, at the capital in the city of Montgomery, on the first Monday of June, in the year of our Lord one thousand eight hundred and seventy, it being the sixth day of said month—

Present and presiding as judges of said court—
Hon. Thomas M. Peters, associate justice;
" Benjamin F. Saffold. " "

Transcript of the record and procedings had before the circuit court for Mobile County, State of Alabama, in the suit of The Mayor, Alderman & Common Council, against F. R. Osborne, agent Southern Express Company, determined in said court at the spring term, 1869, thereof, and appealed by the defendant to the June term, 1869, of the supreme court of the State of Alabama.

Transcript from mayor's docket.

1869. February 10th. Page 216. F. R. Osborne. Charge: Do-
2 ing business without license. Arresting officer, J. Richards. R. A. Lewis, complainant. Sam'l Levi, Samuel Haverman, William Bancroft, and Kinkey, witnesses. Judgment, twenty-five dollars or twenty-five days. Appealed to circuit court.

Appeal bond.

THE STATE OF ALABAMA:

Know all men by these presents that we, F. R. Osborne, agent, and James Badget, are held and firmly bound unto the Mayor, Aldermen & Common Council of the City of Mobile, in the sum of one hundred dollars; for which payment, well and truly to be made to the said Mayor, Alderman & Common Council of the City of Mobile, we do hereby bind ourselves, and our heirs, and assigns, jointly and severally, and firmly by these presents, sealed with our seals, and dated the 11th day of February, in the year of our Lord one thousand eight hundred & sixty-nine.

The condition of this obligation is such, that whereas the above-bounden F. R. Osborne hath, on the day of the date of these presents, claimed an appeal to the circuit court next to be held in and for
3 the county of Mobile, in the State aforesaid, at the next term, 1869, thereof, from a judgment rendered on the 11th day of February, 1869, by Caleb Price, esqr., mayor of the city of Mobile, and ex-officio justice of the peace, in and for said county, in favor of The City of Mobile, for twenty-five dollars debt, besides costs of suit, and hath obtained said appeal: Now, if the said F. R. Osborne, agent, shall prosecute said appeal to effect, and abide by and perform the judgment of the said appellate court in the premises, then this obligation to be void; otherwise to remain in full force and virtue.

F. R. OSBORNE. [L. S.]
JAMES BADGET. [L. S.]

Sealed and delivered in presence of—
JAMES WADE.

Approved, February 11th, 1869.

CALEB PRICE, *Mayor.*

Filed in office, April 20th, 1869.

A. E. BUCK, *Clerk.*

Circuit c't, Mobile Co., Spring T., 1869.

THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, pl'ffs,
vs.
F. R. OSBORNE, DEFENDANT,

4 *Complaint.*

The plaintiffs claim of the defendant twenty-five dollars as a penalty for the breach of an ordinance adopted by the plaintiffs the 2nd day of March, 1868, which ordinance, amongst other things, provided that every express company or railroad company, who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred dollars, which shall be deemed a first-grade license; if within the limits of the State, one hundred dollars, and shall be deemed a second-grade license; and if within the limits of the city of Mobile, fifty dollars, which shall be deemed a third-grade license; said ordinance further provides that any person or persons or incorporated companies doing business or pursuing any avocation, without obtaining the proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine not exceeding fifty dollars for each and every day's violation thereof, to be imposed by the mayor, and collected as other fines; and the plaintiffs aver
5 that, in the spring of the year 1869, to wit, on the 9th day of February, 1869, the defendant was the principal agent and representative in said city of Mobile, of a company called The Southern Express Company, and as such agent he superintended and conducted in said city an express business for said company; that said express business so conducted by the defendant for said company as aforesaid, extended beyond the limits of the State, and that when said express business was so conducted by the defendant in said city as aforesaid, said company had failed to procure a license therefor; and the same was conducted and carried on by the defendant without a license as required by said ordinance; whereby the defendant committed a breach of said ordinance.

And the plaintiffs further aver that, afterwards, to wit, on the 10th day of February, 1869, the mayor of said city imposed a fine of twenty-five dollars upon said defendant for the breach of said ordinance by him as aforesaid, whereby the defendant became and is still liable to
6 pay to the plaintiffs the said sum of twenty-five dollars.

C. W. RAPIER, *Plaintiffs' Att'y.*

The defendant pleads in short by consent, the general issue, with leave to give any matters of defense in evidence.

SMITH & TAULMIN, *Defendant's Att'y.*

Judgment.

Spring term, 1869.

MAYOR, ALDERMEN, AND COMMON COUNCIL of Mobile City,
vs.
F. R. OSBORNE, AGENT TO EXPRESS COMPANY.

Judgment on an agreed statement of facts, May 24th, 1869.

This day come the parties, by their attorneys, and submit the case to

the court on an agreed statement of facts, duly signed by each partie's attorney; and the said plaintiffs move the court for judgment against the defendant; and now the said agreed statement and questions
7 therein presented being read, fully understood, and considered, and the agreement of the respective counsel being heard by the court, it considers that, on the facts agreed, the plaintiffs are entitled to recover; and it is therefore adjudged and considered that the said plaintiffs have and recover of the said defendant herein, and of his surety in appeal, James Badget, the sum of twenty-five dollars, together with the costs in their behalf expended.

Certificate of appeal.

STATE OF ALABAMA, *Mobile County:*

I, Alfred E. Buck, clerk of the circuit court for Mobile County, and State aforesaid, do hereby certify that the defendant in this case did, on the 26th day of May, 1869, apply for and obtain from my office an appeal from the judgment of our said circuit court to the supreme court of the State of Alabama, and that he gave bond with security to supersede said judgment.

In witness whereof I hereunto set my hand this 1st day of June, A. D. 1869.

A. E. BUCK, *Clerk.*

8 *Bill of exceptions.*

State of Alabama, circuit court of Mobile County. Spring term, 1869.

THE MAYOR, ALDERMEN & COMMON COUNCIL of Mobile,
vs.
F. R. OSBORNE.

Be it remembered that this case was submitted on the following agreed state of facts:

Circuit court, Mobile County. Spring term, 1869.

THE MAYOR, ALDERMEN & COMMON COUNCIL of Mobile,
vs.
F. R. OSBORNE.

It is agreed that the facts of this case are as follows, viz:

Before and at the time of the arrest and fine which was imposed in this case, the Southern Express Company had a business office in the city of Mobile, Alabama, and was and had been doing an express business which extended beyond the limits of the State of Alabama.
9 That such business was that of common carriers engaged in carrying by railroads, steamboats, or otherwise as the company might think fit, goods, wares, merchandize, and freights of every kind from places within and beyond the limits of the State of Alabama to said city, and from said city to places in the interior of Alabama, and to points beyond the limits of the State, including transportation of freights and articles of commerce between different States of the Union, as well as goods and merchandize imported from foreign coun-

tries and exported to them. Also including the transportation of such articles imported in the original packages, if so offered, whether between points in the State or points beyond it. That said company was at times *was* employed by officials of the United States Govern'ent in transporting the funds of the Government, consisting of gold and silver coins, United States Treasury and National bank notes from collectors to depositories and assistant treasurers, and from depositories and assistant treasurers to the Treasury of the United States and to its disbursing officers. That said company is a corporate body, incorporated by the State of Georgia, and not by the State of Alabama, or under its laws; and that its principal place of business is at Augusta, Georgia; that there is nothing in the charter of said company nor in any of the company's regulations or by-laws excluding citizens of Alabama or of other States than Georgia from becoming stock-holders in the company. That by the State laws of Alabama the property of said company in said city of Mobile, is made subject to a State and county tax, which the company has paid as required. That said company has paid all other city taxes. That there is an ordinance of said city which requires that the owner of each dray, cart, or wagon, kept for hire or employed in hauling or used for any purpose within the limits of the city, shall obtain a license to run such dray, cart, or wagon; that under this ordinance said company has been and is required to pay to said city a license tax on wagons used in connection with its said express business; and that such wagon tax had been paid by said company for the year ending the 1st January, 1870, and that the aforesaid license tax of five hundred dollars was required for the same period. Said company has als' paid a United States tax for the said year.

It is further agreed that, at the time of the arrest and fine imposed in this case, the said defendant, F. R. Osborne, was the principal agent and representative of said company in the city of Mobile, and as such agent superintended and conducted, in the said city of Mobile, the express business aforesaid of said company; that said company had failed to pay the license tax imposed by an ordinance of the corporate authorities of the city of Mobile, passed under an authority given them by the city charter, to assess and collect from all persons or corporations trading or carrying on any business, trade, or profession, by an agent or otherwise, within the limits of said city a license tax, which shall be assessed in three grades, and to fix by an ordinance from time to time the amount of such license tax for each grade, as may be deemed necessary; that the fine of twenty-five dollars ($25 00) imposed in this case was imposed by the mayor of the city of Mobile upon the defendant because said company was doing said express business in said city of Mobile, through its agent, the defendant as aforesaid, without having paid the license tax of five hundred dollars, as required by an ordinance of said city.

The provisions of the ordinance under which the fine was imposed are as follows, to wit:

"SECT. 2. Every express company or railroad company who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred dollars, which shall be deemed a first-grade license; if within the limits of the State, one hundred dollars, and shall be deemed a second-grade license; and if within the limits of the city of Mobile, fifty dollars, which shall be deemed a third-grade license."

"SECT. 35. Any person or persons, or incorporated companies, doing

business or pursuing any avocation, without obtaining the proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine not exceeding fifty dollars for *such* and every days' violation thereof, to be imposed by the mayor, and collected as other fines."

This ordinance was adopted the 2d day of March, 1866.

Said company insists that such license tax is as to them unconstitutional, and that it is contrary to the acts of Congress relating to commerce, imports, &c., and that they are not bound to pay the same.

If the judge of the circuit court of Mobile is of opinion that the company is liable to pay the tax or license imposed, judgment is to
14 be entered for the plaintiffs for the amount of said fine; otherwise, for the defendant. Both parties reserve all right of appeal.

C. W. RAPIER, *Att'y for Pl'ff.*
SMITH & TAULMIN, " " *Def't.*

The court, upon consideration, held that the plaintiffs were entitled to recover, and rendered a judgment against the defendant in their favor for twenty-five dollars; to which ruling and judgment the defendant excepted, and now tenders this his bill of exceptions, which he prays may be signed, sealed, and made a part of the record; which is done accordingly, in term time.

Given under my hand and seal this the 24th day of May, 1869.

JOHN ELLIOTT,
Judge 6th Circuit, Presiding.

Appeal bond.

STATE OF ALABAMA, *Mobile County:*

Know all men by these presents that we, F. R. Osborne and
15 W. B. Hayden, are held and firmly bound unto the Mayor, Aldermen & Common Council of the City of Mobile, heirs, executors, and administrators, in the sum of two hundred dollars, for the payment of which we, jointly and severally, bind ourselves, our heirs, executors, or administrators, firmly by these presents, sealed with our seals, and dated this 26th day of May, 1869.

The condition of the above obligation is such, that whereas the above-bounden F. R. Osborne, agent Southern Express Company, has this day applied for and obtained an appeal, returnable to the June term, 1869, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said Mayor, Aldermen & Common Council against the said F. R. Osborne, agent Southern Express Company, at the spring term, 1869, of the circuit court for Mobile County, for twenty-five dollars, besides costs:

Now, if the said F. R. Osborne, agent Southern Express Company, shall prosecute to effect his said suit in the supreme court of the
16 said State of Alabama, and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

F. R. OSBORNE, *Agt.* [L. S.]
F. R. OSBORNE. [L. S.]
W. B. HAYDEN. [L. S.]

Filed May 26th, 1869. Citation issued same day.

A. E. BUCK, *Clk.*

Citation in appeal.

STATE OF ALABAMA, *Mobile County:*

To the sheriff of Mobile County, greeting:

Whereas, at a term of the circuit court of Mobile for Mobile County, held on the 5th Monday after the 4th Monday of March, 1869, in a certain cause in said court, wherein The Mayor, Aldermen, & Common Council are plaintiffs, and F. R. Osborne, agent Southern Express Company, defendant, a judgment was rendered against said F. R. Os-
17 borne, agent Southern Express Company,

has, on this day, applied for and obtained from this office, an appeal returnable to the next term of our supreme court of the State of Alabama, to be held at Montgomery on the first Monday of June next; and the necessary bond having been given by the said F. R. Osborne, agent, &c., with F. R. Osborne and W. B. Hayden as sureties:

Now, you are hereby commanded without delay to cite the said Mayor, Aldermen & Common Council, or C. W. Rapier, their attorney, to appear at the next term of our said supreme court to defend against the said appeal, if they think proper.

Witness Alfred E. Buck, clerk of the circuit court of said county, this 26th day of May, 1869.

Attest: A. E. BUCK, *Clk.*

Sheriff's return.

Rec'v'd May 26th, 1869, and on the same day I served a copy of the within citation in appeal on C. W. Rapier.

A. M. GRANGER, *Sh'ff M. Co.*,
By A. D. WHITE, *Dep'ty Sh'ff.*

18 *Certificate of record.*

STATE OF ALABAMA, *Mobile County:*

I, Alfred E. Buck, clerk of the circuit court in and for Mobile County, and State aforesaid, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings had before said circuit court in the suit of The Mayor, Aldermen, & Common Council of Mobile against F. R. Osborne, agent Southern Express Company, determined in said court at the spring term, 1869, thereof, and appealed to the June term, 1869, of the supreme court of the State of Alabama, as appears of record.

In testimony whereof I hereunto set my hand and affix the seal of my office this 1st day of June, A. D. 1869.

A. E. BUCK, *Clerk.*

Supreme court of the State of Alabama.

F. R. OSBORNE, AGENT, &C.
vs.
MAYOR, ALDERMEN, & COMMON COUNCIL OF Mobile. } 1st div., 3381.

Transcript from circuit court Mobile County.—Filed 7th June, 1869.

Supreme court of the State of Alabama. June term, 1869.

F. R. OSBORNE, AGENT,
vs.
MAYOR, ALDERMEN, & COMMON COUNCIL OF Mobile City. } 1st div., 3381.

Be it remembered that this cause was submitted by agreement of the parties on the 23rd day of June, A. D. 1869.

Supreme court of the State of Alabama. June term, 1870.

F. R. OSBORNE, AGENT,
vs.
MAYOR, ALDERMEN, & COMMON COUNCIL OF Mobile City. } 1st div., 3381.

Opinion of court, by Peters, J.

The record shows that the corporate government of the city of Mobile, in this State, passed an ordinance on the 2nd day of March, 1866, of which the following sections were a part, viz:

"SECT. 2ND. Every express company or railroad company who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred
20 dollars, which shall be deemed a first-grade license; if within the limits of the State, one hundred dollars, and shall be deemed a second-grade license; and if within the limits of the city of Mobile, fifty dollars, which shall be deemed a third-grade license."

"SECT. 35. Any person or persons, or incorporated companies, doing business or pursuing any avocation, without obtaining the proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine, not exceeding fifty dollars, for *such* and every day's violation thereof, to be imposed by the mayor and collected as other fines."

It also appears that Frank R. Osborne, the agent of the Southern Express Company, doing busines in the city of Mobile, was, on or about the 10th day of February, 1869, fined by the mayor of said city the sum of twenty-five dollars for a violation of this ordinance. This suit was taken by said Osborne, by appeal, to the circuit court for the county of Mobile, in this State, and submitted to the court upon an agreed
21 state of facts. The judgment against Osborne in the mayor's court was affirmed in the said circuit court at its spring term, 1869; and from this judgment of the circuit court said Osborne appealed to this court. The only question insisted on in said circuit court, and again relied on in this court, is that said ordinance as to said express company is unconstitutional and void, and that said express company is not bound to pay the tax for said license thus levied.

The grounds urged for this exemption, as I understood them, as set out in the brief of the learned counsel for the appellant, are that said ordinance attempts to regulate commerce between this State and other States of the Union, and with foreign states, and it is a duty on exports and imports without the consent of Congress.

The learned counsel for the appellant refers the court to article 1, sect. 8, part 3; article 1, section 9, parts 5 & 18; article 1, section 10, part 2, of the Constitution of the United States, and the acts of
22 Congress to enforce these clauses of the Constitution as the ground of objection to this ordinance. The acts of Congress above mentioned are but an effort to carry into legislative effect the constitutional provisions above referred to. They do not narrow the powers of the State.

Most clearly, the license tax levied by the corporation of the city of Mobile upon the express company for the privilege to carry on its business in said city is no expost or impost duty, either upon foreign trade or the trade between the States of the Union. These terms have been too clearly and repeatedly defined to allow any doubt of this signification now. This is a tax for "a license to do business," by the express company, within the limits of the city. It has nothing to do with the character of the goods and merchandise that the company may transport, or whether they may or may not transport any goods or merchandise at all. An import or export duty, or tax, is a tax levied
23 directly upon the article imported or exported, that is brought into the State or carried out of it. (Brown vs. The State of Maryland, 12 Whea., 419, 437, 438, Passenger Cases; 7 How., 283.) This is not a license to export or to import. It does not then infringe either of the sections of the Constitution above referred to.

Neither is it a tax "to regulate commerce," which is prohibited to the States. To regulate commerce is to prescribe a rule by which it is to be governed. (Gibbons vs. Ogden, 9 Whea., 196; Story's Const., S. 1061, n. 2.) This is nothing of that kind. The company can conduct its business as it pleases, and charge what rate of fees for transportation it pleases. Express companies are common carriers; and this ordinance does not interfere with their duties as such in the slightest. It is simply a tax for license to conduct their business in the city of Mobile, and not a regulation of the business itself. It cannot, therefore, be obnoxious to the constitutional provisions above cited. (Baldwin vs. The American Express Co., 22 Ill., 197; S. C. 26, ib., 504; Southern
24 Express Company vs. Caperton, January term, 1870, head notes p. 24.)

The State may delegate its power to tax or grant licenses to a municipal corporation within the limits of such corporation. This has been done in this case. (Battle vs. The Corporation of Mobile, 9 Ala., 234; Intendent of Marion vs. Chandler, 6 Ala., 899; Eastabrooks vs. The State, 6 Ala., 653; Lott vs. Mobile Trade Co., June term, 1869, head notes p. 20. West vs. Corporate Authorites of Greenville, 39 Ala., 69; Intendent of Greensborough vs. Mullins, 13 Ala., 341.)

The power of the State to levy taxes and impose licenses extends to many species of property, and to all occupations within the State, except when this power is expressly limited by the Constitution of the United States, or by the constitution of the State itself. It has already been shown that the power here exercises does not infringe the Constitution of the Union, and it is not forbidden by the constitution of the State. It is, therefore, legal. (Crandall vs. State of Nevada, 6
25 Wall., 35; Weston vs. City Council of Charleston, 2 Pet., 449; Chief Justice arguendo Prov. B'k vs. Billings et al., 4 Pet., 515, 516; Nathan vs. Louisiana, 8 How., 79, 82; Hinson vs. Lott, 8 Wall., 148; Woodruff vs. Porham, 8 Wall., 123; Warring vs. The Mayor, 8 Wall., 110; Paul vs. Virginia, 8 Wall., 168; Marshall, C. J., arguendo in McCulloch vs. State of Maryland, 4 Whea., 316.)

A State law, and for a like reason the law of a State municipal corporation, will not be declared unconstitutional, unless it is clearly not in conformity with that instrument. Fletcher vs. Peck, C. Cr., 87.

The court below did not err. The judgment of the circuit court is, therefore, affirmed at appellants' costs.

Judgment.

Supreme court of Alabama, 11th June, 1870.

F. R. OSBORNE, AGENT,
vs.
MAYOR, ALDERMEN, & COMMON COUNCIL OF Mobile City. } 1st div., 3381.

26 Came the parties, by their attorneys, and the record and the matters therein assigned as error having been submitted on the briefs of the parties, and duly examined and understood by the court, it seems to the court that in the record and proceedings of said circuit court for Mobile County there is no error.

It is further ordered and adjudged by the court that the judgment of said circuit court for Mobile County be in all things affirmed.

It is, therefore, ordered that the appellees recover of appellant and W. B. Hayden, his surety in appeal, the costs accruing on said appeal in said supreme court, and in the court below.

Petition.

Supreme court of the State of Alabama.

F. R. OSBORNE, AGENT,
vs.
MAYOR, ALDERMEN, AND COMMON COUNCIL OF Mobile. } 1st div., 3381.

To the honorable the judges of the supreme court of the State of Alabama:

Your petitioner, Frank R. Osborne, respectfully shows your
27 honors that, on the 11th day of June, 1870, a judgment was rendered in the said supreme court against your petitioner, as agent of the Southern Express Company, in the cause entitled "Frank R. Osborne, agent, versus The Mayor, Aldermen, & Common Council of Mobile," numbered 3381 of the 1st division, affirming the judgment of the circuit court of Mobile, whereby your petitioner was fined twenty-five dollars ($25 00) as a penalty, because, as such agent, he failed to pay a license tax of five hundred dollars, imposed by the city of Mobile, on the said express company, for doing business in said city as an express company.

The facts of the case are that said license tax was imposed under an ordinance of said city, by virtue of its charter. This ordinance imposed a license tax upon all persons or companies doing an express business in said city according to its grade. There were three grades: 1st, those whose business extended beyond the limits of the State of Alabama; 2nd, those whose business extended beyond the city, but not be-
28 yond the limits of the State; and, 3rd, those whose business does not extend beyond the limits of the city.

The evidence shows that the company was a body corporate, incorporated by the legislature of Georgia, and having its chief place of business at Augusta, Georgia; that its business was to carry merchandise and freights from places out of the State to places beyond its limits, and to carry also imports as they were received in original packages from the places within and beyond the State to places within and beyond said State; and your petitioner insists that the tax is one that discriminates against citizens of other States and taxes business done outside of the State of Alabama, and that it is a duty on imports and exports merely in transitu, and that the same violates the Constitution of the United States and the acts of Congress regulating commerce.

Your petitioner, therefore, prays your honors to grant him a
29 writ of error in said cause to the Supreme Court of the United States, with a citation to the Mayor, Aldermen, & Common Council of the City of Mobile, admonishing them to appear and show cause, if any there be, why said judgment should not be reversed.

FRANK R. OSBORNE,
Ag't So. Express Company.

J. LITTLE SMITH,
Att'y for Petitioner.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frank R. Osborne, agent, &c., and the Mayor, Aldermen, & Common Council of Mobile, wherein was drawn in question the validity of a statute
30 of the said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened to the great damage of the said F. R. Osborne, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to
31 the laws and customs of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the day of July in the year of our Lord one thousand eight hundred & seventy.

Attest:

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the State of Alabama.

This writ of error allowed July 16th, 1870.

E. W. PECK,
Chief Justice Supreme C't Ala.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Mayor, Aldermen, & Common Council of the City of Mobile, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, issued from the circuit court of the United States for the circuit of Alabama,
32 wherein Frank R. Osborne is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the said supreme court of the State of Alabama, this 16th day of July, in the year of our Lord one thousand eight hundred and seventy.

E. W. PECK,
Chief Justice of the Supreme Court of the State of Alabama.

Appeal bond.

Supreme court of Alabama.

FRANK R. OSBORNE, AG'T,
vs.
MAYOR, ALDERMEN, & COMMON COUNCIL OF Mobile.

Know all men by these presents that we, Frank R. Osborne, agent, E. S. Mitchell, and W. P. Chilton, are held and firmly bound unto the
33 Mayor, Aldermen & Common Council of the City of Mobile, in the State of Alabama, in the sum of five hundred dollars, to be paid to the said Mayor, Aldermen, & Common Council of the City of Mobile; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals and dated the 9th day of July, A. D. 1870.

Whereas the above-named Frank R. Osborne hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of Mobile, in the State of Alabama, and affirmed by the supreme court of said State at its June term, 1870:

Now, therefore, the condition of this obligation is such, that if the above-named Frank R. Osborne, agent, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; other-
34 wise the same shall be and remain in full force and virtue.

FRANK R. OSBORNE, [L. S.]
Agent Southern Ex. Company.
EUGENE S. MITCHELL. [L. S.]
W. P. CHILTON. [L. S.]

Approved 16th July, 1870.

E. W. PECK,
Chief Justice Sup. Ct Ala.

Supreme court of the State of Alabama.

I, D. B. Booth, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from one to thirty-four, inclusive, to contain a true, full, and complete transcript of the proceedings had in the supreme court of Alabama, in the case of F. R. Osborne, agent Southern Express Company, appellant, and The Mayor, Aldermen and Common Council of the City of Mobile, appellee, & that an appeal was taken by said F. R. Osborne, agent, &c., on the 16th day of July, 1870.

Given under my hand and the seal of office, at office, in the
35 city of Montgomery, this the 1st day of November, A. D. 1870.

[SEAL.] D. B. BOOTH,
Clk Sup. C't Ala.

[Two-dollar stamp—tax on seals—affixed and canceled.]

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between Frank R. Osbourne, agent, &c., and The Mayor, Aldermen and Common Council of Mobile, wherein was drawn in question the validity of a statute of the said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such, its validity, a manifest error hath happened, to the great damage of the said F. R. Osborne, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy
37 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the day of July, in the year of our Lord one thousand eight hundred & seventy.

[SEAL.] Attest: N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the State of Alabama.

38 This writ of error allowed July 16th, 1870.

E. W. PECK,
Chief Justice Supreme Court of Alabama.

(Indorsed:) Writ of error. F. R. Osbourne vs. Mayor, Alderman & Common Council of Mobile. Filed in office July 16th, 1870. D. B. Booth, clerk.

(Indorsement on cover:) No. 538. Frank R. Osborne, agent Southern Express Company, plaintiff in error, vs. The Mayor, Alderman, and Common Council of Mobile. Alabama sup. court. Filed 10th May, 1871.

1871.

Supreme Court of the U. S.

FRANK R. OSBORNE, Agent of the Southern Express Co.,

vs.

THE MAYOR, ALDERMEN AND COMMON COUNCIL of Mobile.

Brief for Plaintiff in Error.

B. R. CURTIS,

C. A. SEWARD,

Of Counsel for Plaintiff in Error.

NEW YORK:
DAVIS & CORSON, LAW PRINTERS,
No. 39 NASSAU STREET.

1872.

1871.

Supreme Court of the United States.

FRANK R. OSBORNE, AGENT OF THE SOUTHERN EXPRESS COMPANY,

vs.

THE MAYOR, ALDERMEN AND COMMON COUNCIL OF MOBILE.

BRIEF FOR THE PLAINTIFF IN ERROR.

THE CASE.

The Southern Express Company is a corporation created solely by the State of Georgia (Record p. 4), and has its principal place of business at Augusta. In February, 1869, it was engaged as a common carrier in the transportation of goods, wares and merchandize, from places within and beyond the limits of the State of Alabama, to the City of Mobile, and from said city to places within and beyond the limits of said state. Such transportation was carried on by means of rail-

roads and steamboats. The company did business, and had an office in the City of Mobile (p. 3).

The plaintiff in error was the agent of the company in Mobile (p. 4).

The defendant in error, under the authority of the City Charter (p. 4), on the second of March, 1868, passed an ordinance (p. 2) containing *inter alia*, the following provisions:

"*Section* 2. Every express company or railroad company who shall do business in the City of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred dollars, which shall be deemed a first grade license; if within the limits of the State, one hundred dollars, which shall be deemed a second grade license; and if within the limits of the City of Mobile, fifty dollars, which shall be deemed a third grade license."

"*Section* 35. Any person or persons, or incorporated company doing business or pursuing any vocation, without obtaining a proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine, not exceeding fifty dollars for each and every day's violation thereof, to be imposed by the mayor, and collected as other fines."

The company did not pay five hundred dollars as required by this ordinance (p. 4), and for that reason

the plaintiff in error, on the tenth of February, 1869, was arrested, and tried by the Mayor for "doing business without license" (p. 1), and judgment was rendered against him for "twenty-five dollars or twenty-five days"(p. 1). From this judgment the plaintiff in error appealed to the Circuit Court for the County of Mobile; and simultaneously therewith, and in accordance with the practice there prevailing, the defendant in error commenced (p. 2) in said Circuit Court, at its Spring Term in 1869, a civil suit against the plaintiff in error, to recover the amount of this fine or penalty. The plaintiff in error appeared in said suit, and, answering shortly, agreed with the defendant in error upon a statement of facts, upon which statement of facts judgment was rendered by the said Circuit Court on the twenty-fourth of May, 1869, for the amount of said penalty, together with costs (p. 5). From this judgment the plaintiff in error appealed to the Supreme Court of the State of Alabama, being the highest Court of law or equity in said State (p. 3), on a bill of exceptions duly signed, sealed, and allowed by the said Circuit Court (p. 5), and the Supreme Court decided that there was no error in the record, and affirmed the judgment (p. 9). From such judgment of affirmance a writ of error to this Court was allowed by the Chief Justice of the Supreme Court of Alabama.

The plaintiff, in error alleged upon record (p. 5) in

the Court below, on behalf of the company, that such license tax is as to them unconstitutional, and that it is contrary to the Acts of Congress, "relating to commerce and imports, and that they are not bound to pay the same." The Circuit Court overruled this objection, and an exception thereto was duly taken (p. 5). The Supreme Court sustained the ruling (p. 9), and the writ of error brings the exception and the adverse ruling thereon here for review.

POINT I.

This Court has jurisdiction to entertain this appeal and to review the ruling of the Court below.

1. Such jurisdiction is conferred by Section 25 of the Judiciary Act of 1789 (1 *U. S. Stat. at Large*, 85), which is as follows:

"A final judgment or decree, in any suit, in the highest Court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a Statute of, or an authority exercised under any State, on the ground of their be-

ing repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity ; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or Statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment, or decree complained of, had been rendered or passed in a Circuit Court."

This section was held in *Ward vs. Maryland* (12 *Wallace* 423) to give power to this Court to revise, on the designated grounds, a judgment pronounced in a criminal proceeding.

2. Such jurisdiction is, however, more amply conferred by Section 2 of the Act of 1867 (14 *U. S. Stat. at Large*, 386), which is as follows :

"A final judgment or decree in any suit, in the highest Court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or Statute of, or an authority exercised under the United States,

and the decision is against their validity, or where is drawn in question the validity of a Statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or Statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, Statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error * * * in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

3. The proceeding below was a "suit." It is so stated in the Record (p. 1.) The decision against the plaintiff in error is there denominated a "judgment." The "final judgment" of affirmance was rendered by the "highest Court of the State" of Alabama (p. 10.) The literal language of both Statutes is, therefore, fulfilled.

4. The plea of the plaintiff in error in the Courts below was, in substance, that under the Constitution

and laws of the United States, his employer, the express company, had a lawful right to carry merchandise from and to the State of Alabama and the City of Mobile, without paying the prescribed license tax; that the ordinance in question gave no lawful authority to arrest or fine him for having neglected or refused to obtain such license or to pay such tax; that such ordinances were violative of the provisions of the Constitution, and of the laws of the United States relative to commerce and imports. The plea raised, therefore, the precise question required by the second section of the Act of 1867, to give this Court jurisdiction, because the plaintiff in error then claimed.

a. An authority under the Constitution and laws of the United States to transport goods, wares and merchandize to and from the State of Alabama and the City of Mobile, without obtaining a license and paying a fee therefor.

b. That the authority claimed by the Mayor, under the charter of the city to render judgment against him for not obtaining a license, was repugnant to the Constitution and laws of the United States.

c. A privilege and immunity under the Constitution and laws of the United States to carry on an interstate transportion without obtaining a license or paying a fee therefor.

This plea and these objections were overruled, and judgment rendered against the plaintiff in error (p. 5). Such judgment was "against the validity of the authority" claimed by the plaintiff in error; was "in favor of the validity of the authority" claimed by the Mayor, and "against the privilege and immunity set up and claimed by" the plaintiff in error under the Constitution and laws of the United States.

5. It is not necessary, under the Act of 1867, that the record should show that the validity of a State "Statute," in its literal acceptance, was called in question in the Court below; but if it were, the ordinances in question being claimed to be lawfully passed under the City Charter, have incorporated in them the charter itself, and such charter is judicially cognizable as an Act of the Legislature.

But this precise question against this same defendant in error has already been passed upon by this Court.

In the case of *Waring vs. The Mayor* (8 *Wallace* 110,) the corporate authorities of Mobile imposed a tax for municipal purposes upon all sales of merchandize in that city, and claimed of Waring a tax upon the sales of salt that he had made for six months preceding the date of the ordinance, under its conditions. He refused to pay, alleging that the ordinance was unconstitutional; and the Mayor arrested and fined him, and the case came here for review, and the appeal was

entertained as having been properly brought under the 25th Section of the Judiciary Act.

POINT II.

The Constitution of the United States *Act I, Section* 8, *Subdivision* 2) gives Congress power to "regulate commerce among the several States." This power is exclusive of the exercise of a similar power by the States. This is conceded to be so when Congress has exercised its constitutional power. (*Sinnott vs. Davenport* 22 *Howard* 227; *Passenger Cases*, 7 *Howard*, 400.)

It must also be conceded that this constitutional power is exclusive, whether exercised or not, whenever the subject matter which the State assumes to regulate, is of national concern. Such is the effect of the decision in *Cooley vs. The Board of Wardens* (12 *Howard*, 319), in which it was said that "whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." In *Ward vs. Maryland* (12 *Wallace*, 427) it was said that "implied prohibitions restricting the power of the States also exist which are as effectual to that end as those

which are expressed," and that "where the nature of the power granted, or the terms in which the grant is made, are of a character to show that State legislation upon that subject would be repugnant to the Federal grant, the power of Congress over the given subject was exclusive of similar powers existing in the States."

This principle was affairmed in *Hinson vs. Lott* (8 *Wallace*, 152), and in *Steamship Co. vs. Port Wardens* (6 *Wallace*, 34); and it was upon the authority of these cases, and upon the principle which they established, that the Court of Errors and Appeals in New Jersey, felt itself bound to declare unconstitutional a Statute of that State levying a tax upon goods in transitu through the State. (*Erie Co. vs. State*, 13 *Am. Law Reg.*, 238; *S. C.*, 31 *N. J. Law Reps.*, 531.)

POINT III.

If it can be properly affirmed that the ordinances in question affect the commerce of the nation, then their adoption and enforcement by the defendant in error are alike an invasion of the exclusive power of Congress, and they must be adjudged invalid.

a. What is commerce?

"Commerce is intercourse." (*Brown vs. Maryland*, 12 *Wheaton*, 446.)

b. Intercourse implies vehicles, instrumentalities and agencies. What vehicles, instrumentalities and agencies may be used in national commerce, without becoming subject to State control.

1. The United States Constitution provides (*Article* I, *Section* 9, *Sub-division* 5) that no "vessel bound to or from one State, shall be obliged to enter, clear or pay duties in another."

The spirit and intent of this would amplify the word "vessel" so as to make it embrace all commercial vehicles which have been brought into use since the adoption of the Constitution. Such amplification is not without judicial sanction.

2. "It is admitted that the steamer was engaged in shipping and transporting goods. She was employed as an instrument of commerce" (*The Daniel Ball*, 10 *Wallace*, 565); and this, though the steamer did not run beyond the limits of the State. Indeed, Congress has passed innumerable Acts regulating steamboats, and has thus declared them instruments of national commerce. (*Brightly's Dig.*, 848, 2 *id*, 537.) "The right to do this depends wholly on the power vested in Congress, to regulate commerce." (*Clinton Bridge*, 1 *Woolworth*, 160.)

3. "Another means of transportation, equal in importance to the steamboat, has also come into existence since the Constitution was adopted. The railroad now

shares with the steamboat the monopoly of the carrying trade. When these roads become part of the great highways of our Union, there can be no reason to doubt that to regulate them is "to regulate commerce." (*Clinton Bridge, supra.*)

c. The Record alleges (p. 3) that the business of the express company is "that of common carriers, carrying by steamboats and railroads." It is thus employing instruments of national commerce.

d. What is national commerce, over which Congress has exclusive control? The Constitution defines it with precision: "Commerce with foreign nations, and among the several States, and with the Indian tribes."

The Record alleges (p. 3) that "the business of the express company is carrying by railroads and steamboats, goods, wares, merchandize and freights of every kind, from places within and beyond the limits of the State of Alabama to said city" (of Mobile), "and from said city to places in the interior of Alabama, and to points beyond the limits of the State, including the transportation of freight and articles of commerce between different States of the Union, as well as goods and merchandize imported from foreign countries and exported to them."

The express company is, therefore, engaged in commerce "among the several States and with foreign

nations," within the literal interpretation of the Constitutional provisions.

The transportation of goods destined for other States and countries is commerce between such States and countries. "Whenever a commodity has begun to move, as an article of trade, from one State to another, commerce in that commodity between the States has commenced. However limited this commerce may be, it is subject to the regulation of Congress. To the extent to which such agency acts in that transportation it is subject to the regulation of Congress." (*The Daniel Ball.*)

e. The ordinances in question purport upon their face to be directly applicable to inter-state commerce. Their language is, "every express company or railroad Company who shall do business in the City of Mobile, and *whose business extends beyond the limits of the State*, shall pay an annual fee of five hundred dollars," and they subject the *agents* of the company to imprisonment if the fee is not paid.

"The power to regulate commerce extends to the persons who conduct it as well as to the instruments used." (*Clinton Bridge.*)

These ordinances, therefore, impose a direct tax upon inter-state commerce, and requires a license fee to be paid for a steamboat coming from New Orleans

to Mobile, which is a port of entry. (1 *Brightly's Dig.*, 32, 33.) In such particular the ordinances are clearly violative of the provisions of the Constitution, which guarantee steamboats freedom from that duty. Are not railroads equally free? Their cars are "vessels," and would seem to be equally deserving of, and entitled to, freedom from taxation, when entering and leaving a port by a rail highway on their land voyage to another State. "The power of regulating commerce extends as well to vessels employed in carrying passengers as to those employed in the transportation of property, and applies equally to those propelled by steam or fire, as to those navigated by the instrumentality of winds and sails." (*Evans vs. Ogden*, 9 *Wheaton*, 1.) "The power to regulate commerce does not stop on the mere boundary line of a State, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the States." (*U. S. vs. Coombs*, 12 *Peters*, 78.)

f. What cannot a State lawfully do? "A State has no power to regulate a commerce which extends beyond its jurisdiction," (*Haldeman vs. Beckwith*, 4 *McLean*, 286), nor "has it any power to place restrictions upon commerce between the States."

Are the ordinances in question a regulation of commerce?

The plaintiff in error was arrested and fined, and sentenced to imprisonment, and sued for a penalty, for conducting and carrying on the business of an express company without a license; in other words, for not having paid the prescribed five hundred dollars. No form of expression or of imposition can disguise the fact that this is a tax for the privilege of doing business in the City of Mobile. The Court below, in its opinion, calls it "a license tax levied by the corporation of the City of Mobile upon the express company for the privilege of carrying on its business in said city." This is a home assertion, by the Courts of the State, that the license fee is "a tax to do business." A tax to do business, however styled, is a tax on the business, to be paid by and out of the business, and in practical life is never paid unless in common parlance, "the business will afford it." In the present case, the tax is upon inter-state transportation of goods, wares and merchandise, which if such transportation be national commerce, cannot be lawfully imposed by a State or by any constituent thereof. "Congress has regulated commerce between the several States by willing that it shall be free; and it is therefore not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for

permission to exercise it." (*Passenger Cases*, 7 *Howard*, 464.) "A distinction between a tax on the thing imported, and the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce." (*Brown vs. Maryland*, *supra*.) "The amount of the tax cannot affect its legality. If the present duty, which it may be assumed the business of the plaintiff can easily bear, is legal, so also would be a duty under which such business must necessarily languish and die." (*Erie Co. vs. The State*, *supra*). "The power to tax involves the power to destroy." (*McCullock ss. Maryland*, 4 *Wheat*, 431.) "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or Corporation which imposes it, which the law of such State or Corporation may prescribe." (*Weston vs. The City of Charleston*, 2 *Peters*, 466; *The Collector vs. Day*, 11 *Wallace*, 123.) "The Legislature of the Union alone can be trusted by the people with the power of controlling measures which concern all." (*McCulloch vs. Maryland*, *supra*). If the City of Mobile can lawfully impose the present tax, every State, city, town and incorporated village in the Union can impose a greater one. Commerce must then cease her labors, withdraw her vehicles, and succumb to local taxation.

POINT IV.

The tax in question is a duty upon both exports and imports, and, therefore, violates section 9, Sub-division 5 of Article I, and section 10, Sub-division 2 of the Constitution.

A tax upon transportation is a tax upon the goods, wares, and merchandise transported. The two must be united to constitute inter-state commerce, and a tax upon one of the elements operates as a tax upon the other. A tax upon the transportation of goods, wares and merchandise brought from within Alabama for export, or upon the goods, wares and merchandise brought from abroad into the State of Alabama, is a tax upon both exports and imports, and not valid under the Constitution. (*State Tonnage Tax Cases*, 12 *Wallace*, 215).

POINT V.

The later decisions in this and other Courts seem to be in harmony with the foregoing views.

1. The law of New Jersey, levying a tax upon the business of foreign railroad companies, carrying goods, wares and merchandize through the State, was held by the highest Court of that State to be in violation of the Constitution, although Congress had passed no Act

in relation thereto. (*Erie Co. vs. State, supra*; *Hackley vs. Geraghty*, 340, *N. J. L.*, 332).

2. A Statute of the State of California, which required a stamp to be purchased from the State by all passenger companies doing business in the State, for each passenger carried, was held to be a regulation of commerce, and to be regarded in no other light than as a tax on the contract for the passage, and as violation of the provisions of the Constitution above referred to. (*People vs. Reymond*, 34 *California Rep.*, 492).

3. In the *State vs. Kennedy* (19 *La. An.* 397), the Supreme Court of Louisana, adjudged unconstitutional a State law, imposing taxes upon the sales of property sent by citizens of other States of the Union for sale, holding that "each State cannot tax property brought from other states of the Union, for sale or reshipment, until it has been mixed with and forms a part of the common mass of the property of the State," and "that the doctrine that the States have a concurrent power with Congress to regulate commerce between the States, would seem to involve the very difficulty which it was obviously the purpose of the framers of the Constitution to provide against."

4. In *Ward vs. Maryland* (12 *Wallace*, 430), it was said that the clause of the Constitution here relied upon, "plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any

other State of the Union, for the purpose of engaging in legal commerce or trade without molestation." "Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the powers conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the States to tax, would prove more efficacious to promote inequality, than any regulations which Congress could pass to preserve the equality of right contemplated by the Constitution. Inequality of burdens, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation, and the new constitution was adopted among other things to remedy those defects in the prior system."

5. In *Paul vs. Virginia* (8 *Wallace*, 182), this Court said: "It is undoubtedly true that the power conferred upon Congress to regulate commerce, includes as well commerce carried on by corporations, as commerce carried on by individuals * * * There is therefore nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not

articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They do not constitute a part of the commerce between the States, any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia, would constitute a portion of such commerce." Clearly, if the Court in this case had been of opinion that a policy of insurance was a commercial instrument, they would have applied to it the reasoning in *Almy vs. California* (24 *Howard*, 169), in which this Court held that "a tax or duty on a bill of lading, though differing in form from a tax on the article shipped, is, in substance, the same thing," and is unconstitutional and void.

6. In *Steamship Co. vs. Port Wardens* (6 *Wallace*, 33), this Court said: "That the Act of the Legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon their entry. In the case of a steamer plying between that port and the ports in the adjoining States of Mexico or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States." If

the express company in the present case were simply engaged in transporting goods to and from the City of Mobile by steamboat, it would be required, as it now is, to pay the prescribed license fee, and such payment would be a direct tax upon the steamboat for the privilege of entering and leaving the port, and also upon the commerce of which it would be the instrument.

POINT VI.

Congress has granted lands to the State of Alabama for the purpose of constructing railways, and has declared that such railways shall be "public highways" (14 *U. S. Stat. at Large*, 15, 17).

The intent of this is obvious, and excludes the idea of local taxation to arrest transit on such highways.

POINT VII.

Congress has especially recognized railways as vehicles of commerce, and authorized inter-state transportation thereon, free from State restrictions. The Act of 1866 (14 *U. S. Stat. at Large*, 66) is as follows :

"An Act to facilitate commercial, postal and military communication among the several States."

"Whereas, the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States * * *; Therefore, be it enacted * * * That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and it is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."

This means freedom from State interference under any guise, and it was in consequence of such interference that the law in question became necessary, and was passed. Taxation in any degree is ultimate prohibition, and that would contravene the Congressional guarantee of free inter-state communication. Congress having "willed that commerce shall be free" from any State burden thereon, *a fortiori* any prohibition thereof, either intermediate or direct, is *ultra vires*, unconstitutional and unlawful.

POINT VIII.

The Articles of Confederation seemed to leave to the States a right to impose such burdens upon interstate commerce as each State might see fit. Those articles provided as follows:

Article 4.—"The people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

Article 5.—"No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the Courts of France and Spain."

Article 9.—"The United States in Congress assembled shall have the sole and exclusive right of determining peace and war; of sending and receiving ambassadors; entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

"The United States in Congress assembled, shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any States, provided that the legislative rights of any State, within its own limits, shall not be infringed or violated."

The operation of these provisions is very clearly shown by contemporary records.

In the debates in Virginia (3 *Elliot's Debates*, 278) Mr. GRAYSON said:

"Under a supposition that mankind can govern themselves, I would recommend that the present Confederation be amended. Give Congress the regulation of commerce."

In the Debates in Massachusetts (2 *Elliot*, 57), Mr. DAWES said:

"As to commerce, it is well known that the different States now pursue different systems of duties in regard to each other. By this, and for want of general laws of prohibition through the Union, we have not secured even our own domestic traffic that passes from State to State. This is contrary to the policy of every nation on earth."

In the first Congress Mr. MADISON introduced a re-

solution, "That no State be at liberty to impose duties on any goods, wares or merchandize, imported by land or by water, from any other State." (1 *Elliot*, 114.)

In No. 7 of the *Federalist*, Mr. HAMILTON said:

"The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate Confederacy, would pursue a system of commercial polity peculiar to itself. * * * The spirit of enterprise which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens.

"The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars. The opportunities which some States would have of rendering others tributary to them, by commercial regulations, would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut and New Jersey would

afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative."

In No. 22 he further said:

"In addition to the defects of the existing federal system, enumerated in the last number, there are others of not less importance, which concur in rendering that system altogether unfit for the administration of the affairs of the Union. The want of a power to re-

gulate commerce, is by all parties allowed to be of the number. The utility of such a power has been anticipated under the first head of our inquiries; and for this reason, as well as from the universal conviction entertained upon the subject, little need be added in this place. It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendance. The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers; and has given occasion of dissatisfaction between the States. * * * The interfering and unneighborly regulations of some states, contrary to the true spirit of the union, have, in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they become not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy. "The commerce of the German Empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandizes passing through their territories; by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless." Though the genius of the people of this

country might never permit this description to be strictly applicable to us, yet we may reasonably expect from the gradual conflicts of state regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens."

Mr. Madison, in No. 42, said:

"The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the states which import and export through other states, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen that ways would be found out to load the articles of import and export during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances;

and both by that, and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. * * * The necessity of a superintending authority over the reciprocal trade of confederated states, has been illustrated by other examples as well as our own. In Switzerland, where the Union is so very slight, each canton is obliged to allow to merchandize, a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany it is a law of the Empire, that the Princes and States shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the Emperor and diet; though it appears from a quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts disadvantageous to their neighbors without the general permission. The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State

within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the union with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain."

It was the influence of considerations like those cited which induced the States to give to Congress the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." Such power necessarily fails of accomplishing the object for which it was bestowed, unless it is conceded to be exclusive, and as preventing the States from placing any restrictions upon commerce "among the several States."

POINT IX.

This Court should reverse the judgment of the Supreme Court of the State of Alabama, and in the language of the Act of 1867, "proceed to a final decision," by adjudging the ordinances in question unconstitutional and void.

B. R. CURTIS,
C. A. SEWARD,
Of Counsel for Plaintiff in Error.

Supreme Court of United States.

F. R. OSBORNE,
Agt. Express Company,
v.
MAYOR, &c., MOBILE.
No. 91

Brief of P. PHILLIPS.

This is a writ of error to the Supreme Court of Alabama, which sustained the validity of a tax imposed upon the plaintiff in error.

The ordinance under which the tax was levied is as follows:

"Every express company or railroad company who shall do business in the city of Mobile, and whose business extends beyond the limits of the State shall pay an annual license of $500, which shall be deemed a first grade license; if within the limits of the State $100, and shall be deemed a second grade license; and if within the limits of the city $50, which shall be deemed a third grade license," p. 4.

The case was submitted to the judgment of the Circuit Court on an agreed statement of facts, p. 3. From this it appears that Osborn was the agent of a Georgia corporation, whose headquarters was in Augusta; that he

resided in Mobile, where he carried on the business of the corporation known as the Southern Express Company, which extended to the carrying of merchandize by "railroads, steamboats, or otherwise, from places within and beyond the limits of the State to said city, and from said city to places in the interior of Alabama, and to points beyond the limits of the State, including transportation of articles of commerce between different States, as well as merchandise imported from foreign countries. Also such articles imported in the original packages, if so offered, whether between points in the State or points beyond it." It is further agreed that this agency had paid taxes to the State on its property, and taxes to the city on its wagons employed in the city in aid of its business.

On the trial before the Circuit Court, in answer to the complaint, the defendant plead the "general issue with leave to give any matters of defence in evidence." p. 2.

The judgment was rendered on the agreed statement, which concludes with the averment by the company, that the tax "is *unconstitutional* and contrary to the *acts of Congress* relating to commerce, imports, &c." p. 5.

In the Supreme Court there was no assignment of errors, and a simple judgment of affirmance.

There is, thus far, no evidence that the latter judgment—the subject of review—passed upon any federal question. If it may be implied that the objection raised in the Circuit Court and there overruled, was again insisted on in the Supreme Court, so as to sustain the jurisdiction, then this Court must be confined to the legitimate scope of the averment in the Circuit Court. The plea there is, that the act is unconstitutional and contrary to the acts of Congress. It is not said that the

Constitution of the *United States* was violated. The attention of the Court is not called to that instrument, nor are any of its provisions referred to, we are therefore ignorant as to whether the question of unconstitutionality had reference to the State or the federal constitution.

Acts of Congress are referred to, but no specific act is brought to the attention of the Court. This is certainly very loose practice, and the Court must now determine whether jurisdiction will be taken under such circumstances.

The act of 1789 required, that the error complained of should "appear on the face of the record," and that no other error "shall be assigned or regarded as a ground of reversal."

Under this act the Court has steadily refused to refer to the opinion of the judge as part of the record.

The act of 1867, which re-enacts the 25 section of the act of 1789, omits the words quoted. The Court has not yet decided as to the effect of this omission. The jurisdiction of all Appellate Courts must necessarily be determined by the inspection of the *Record* before them. It would be dangerous practice to determine this by evidence *dehors* the record. To reconcile the two acts, and place the question on a safe foundation, the Court may be called on to extend the rule as to what constitutes the record, so as to include the "opinion" when certified in the transcript.

Assuming that the Court will maintain jurisdiction if it finds in the "opinion" the determination of a federal question, then we admit the case is properly before it. The opinion clearly shows, that the act was sustained on the grounds that it was not a tax on exports or imports,

and was not obnoxious to the grant of the commercial power.

Our first inquiry then is, whether there is anything in the character of the plaintiff in error as a foreign corporation which creates an exemption from taxation?

By a statute of Virginia, no foreign insurance corporation is allowed to do business in the State without first procuring a license, and in addition thereto, depositing bonds to secure insurers against losses. This act discriminated between foreign and home corporations.

It was insisted, by the eminent counsel who argued in opposition to the statute, that it was void because the corporation was to be regarded as a citizen entitled to like privileges and immunities as citizens of Virginia, and, also, because it was a regulation of commerce between the States. Both of these grounds were overruled by this Court.

On the first ground, the Court held that the corporation of one State had no absolute right to carry on business in another State. That as this could only be done by the assent of the State, it must transact its business upon such terms and conditions as the State may impose.

(Paul v. Virginia, 8 Wall., 181.)

This power to discriminate in the levying of taxes, against a foreign corporation as held in this case, is sustained by the decision of other courts.

Attorney General v. Bay Co., 99 Mass., 148.

Tatem v. Wright, 3 Bab., 429.

Slaughter's Case, 13 Grat., 767.

Ducat v. Chicago, 10 Wall., 415.

But the act in question makes no such discrimination. It taxes alike "every express or railroad company who shall do business in the city of Mobile." Its own corporations who hold by charter from the State are made subject to the same rule as is applied to corporations holding charters from other States.

If, therefore, the tax is invalid in reference to this Georgia corporation it is equally so in reference to all the express and railroad companies incorporated by the State.

It then comes to this, that while the State has the power of incorporation it cannot even by *express reservation in the charter* tax the business of these corporations, because they are common carriers, and engaged in carrying on the commerce of the country. Such a conclusion is opposed to all just reasoning, and finds no support in the judgments of the Courts.

Is there anything in the character of the business which should except the corporation from State taxation?

By the Louisiana statute every exchange broker is required to pay a certain annual tax. The exemption was sought to be maintained in favor of a broker who dealt exclusively in foreign bills of exchange, by which the commerce of the country was largely carried on; and so it was contended this was a rgulation of commerce.

This Court held that a bill of exchange was in no sense an export or import. That it was an *instrument*, rather than a subject of commerce.

"The right of the State, (say the Court,) to tax its

own citizens for the prosecution of any *particular business* or profession within the State *has not been doubted.*

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? Is the vendor of these products exempt from taxation because they may be thus used? Is the tax upon a ship as property, admitted to be an instrument of commerce prohibited to the State? May it not tax the business of ship-building the same as the exercise of any other mechanical art? And also the traffic of ship chandlers and others who furnish the cargo of the ship and the necessary supplies?"

The taxing power of the State, except as restrained by the Federal Constitution, is exercised at its own discretion, without any responsibility except to its own citizens. "If this power may be restricted on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. State power does not rest on a basis so indefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and *also the numberless enterprises in which its citizens may be engaged.* These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair the exercise of State sovereignty." (Nathan v. Louisiana, 8 How., 73.)

By the Maryland statute, persons selling goods by sample were required to obtain a license, but the price of this license to a non-resident was double that to be paid by a citizen of the State. This act was assailed on the grounds, first, that it discriminated, and thus deprived the non-citizen of his "equal rights and privileges," and second, because it was a regulation of commerce.

This Court decided the act to be unconstitutional on the first ground. But in the reasoning of the Court, it is apparent that the act would have been sustained if it had charged the same tax on residents and non-residents. That this is so, may be seen in the separate opinion of Mr. Justice Bradley, who, while concurring in the opinion that it was a discriminating tax and void on that ground, enters his dissent "from any expression in the opinion which implies that such a burthen, whether in the shape of a tax or penalty, if made equally on residents and non-residents would be constitutional."

(Ward v. Maryland, 12 Wall., 432.)

The business of express companies is well understood; they use the means of conveyance which they find established in a State for the carriage of small parcels. They receive an extra rate of fare for the superior safety which this mode of transportation is supposed to afford. They are in the nature of their business insurers. They carry from point to point in a city, from county to county—or agree to extend their liability even beyond the State line.

In taxing this occupation, no regard is had to the articles he carries. In regulating the license fee, regard is had to the supposed income or profits derived from the business.

This company resisted the taxing power of the State of South Carolina, where the tax was on "the gross amount of receipts, $10 on every $100," and the act was sustained by an eminent judge, (Dunkin, C. J.)

Southern Express Co., v. Hood, 15 Rich., 66.

In the State of Georgia, where the corporation derives its charter, it is subject to the law which provides that,

"every express company doing business in this State shall pay a tax of one per cent. upon the gross amount of their property for each year, *on business done at its offices in this State.*" Code of Geo., § 751.

This act differs in no material respect from the one imposed by Alabama.

The argument on the other side is that the tax in question is a tax upon exports and imports, and a regulation of commerce, and for the reason that however slight the burthen imposed upon the express carrier, it falls ultimately on the thing carried, and, is therefore, substantially the same as if the articles themselves were directly taxed.

It therefore follows that the form of the tax is immaterial. The character of the business itself creates an entire exemption, together with all property which is necessary for its prosecution. The office of the Company, its warehouses and the drays used for transporing goods to and from it, so as to connect with the roads and vessels by which the transportation is effected, are all excluded from the power of taxation. For if this business is by the Constitution of the United States secured against State taxation, it would seem necessarily to follow that the necessary means for carrying it on must be equally exempt. Yet in this case the company admits that it is liable to pay and does pay a license tax for the drays used in making the connection between the roads and vessels. That a dray is used as a portion of the line over which the transportation is made, does not vary its character as common carrier or change its liability. The thing thus carried is as much an export or import, while on the dray, as it is when it is put on the rail car·

Commerce is as much concerned when the dray is transporting the article as when the same operation is effected by the rail road. All the reasoning which applies to the exemption of one of the means applies with like force to all the means employed in the service of commerce.

The case of the Erie railway v. State, 31 N. J., is principally relied on to sustain the argument on the other side.

The act in that case taxed only foreign corporations transporting over the State road passengers and freights passing entirely through the State.

This discrimination constitutes the foundation of the decision, and it should be read in its application to the law under consideration.

In that decision holding that a direct tax of three cents a passenger and two cents a ton on merchandise was unconstitutional, the Court takes care to guard itself against the conclusion that the power of the State could in no manner be exerted. They say, "It is admitted that the State may impose a tax which incidentally affects commerce. Indeed it is impossible to imagine any tax which in theory may not be said to have in the distance such effect."

The rule of discrimination is thus stated. "The tax imposed, must, to avoid the taint of unconstitutionality, be indirect in substance and not merely so in form."

In the case of the Savings Bank v. Coite, 6 Wall, 607, this distinction is likewise adverted to.

The tax was "a certain per centage on the total amount of deposits." The exemption was claimed on the

ground that these deposits were invested in the securities of the United States, which an act of Congress declared were not subject to state taxation.

The argument was, "that the tax if not on property *as such*, is *measured by the extent of the property*, the amount of deposits being the measure. A tax upon 'faculty' or 'franchise,' estimating its value by the money it has secured, is the same thing in substance as *taxing the money secured*, and a tax upon the money secured or with *reference to it as a basis*, is substantially the same thing as *tax upon the securities for which it has been exchanged.*

This view was not sustained by the Court, and the validity of the act was maintained on the ground, that it was a franchise tax and not a tax on the property.

It is supposed that the act now before the Court, is in conflict with some act of Congress. The only act cited is that of 1866, at p. 22, of the brief of the plantiff in error (14 Stat., 66.) There is nothing in this which directly or indirectly deprives the State of the taxing power if such power existed before its passage.

The effect of the grant of the commercial power upon the taxing power of the States is thus stated by Judge Cooley—"Congress is vested with the power to regulate commerce; but this power is not so far exclusive as to prevent regulations by the States also when they do not conflict with those established by Congress *The States may unquestionably* tax the subjects of commerce: and no necessary conflict with that complete control which is vested in Congress appears *until the power is so exercised* as *to defeat or embarrass the congressional legislation*, when Congress has not acted at all on the subject, the State taxation cannot be invalid on this ground; but when natural relations exist under which rights are established or privileges given, the State can impose no burthen

which shall in effect make the enjoyment of those rights and privileges contingent upon the payment of tribute to the State."

Cooley on Cons. Lim., p. 486.

These principles are fully sustained by the opinion of the Chief Justice in the license cases, 5 How. "The question says he, (p. 578,) for decision is whether the State is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another State although such regulation is confined to its own territory, and made for its own convenience and interest, and does not come in conflict with any law of Congress."

After a full review of the decided cases, he concludes thus at p. 585. "I am not aware of any instance in which the Court have spoken of the grant of power to the general government, as excluding all State power over the subject unless they were deciding a case, *where the power had been exercised by Congress* and the *State law came in conflict with it.*"

Lurking behind this case is the question, whether the railroads of the country whose aggregate power is now dominating the Legislatures of the States and even Congress itself, and whose capital is counted by hundreds of millions, are entitled to a further increase of power, by exemption from taxation.

The attempt was made lately by the great Pacific R. R. under very imposing circumstances, to claim this exemption by reason of its affiliation with the Federal Government, and as being the means by which its constitutional functions were performed.

It was not pretended in that case to sustain the claim,

that as common carrier, (engaged as it undoubtedly is in the great through commerce of the country,) the exemption could be maintained. But if this Court should determine that Express Companies are exempt on the grounds now insisted on, the Calendar of this Court would soon present the case of the Railroad demanding the like exemption.

In delivering the opinion of the Court in the case referred to, the Chief Justice looking probably to this not remote future, takes Time by the forelock. He says, "No one questions that the power to tax all property, *business*, and persons within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to *defeat or hinder the operations of the National Government;* but it will be safe to conclude in general, in reference to persons and State corporations, employed in government service that where Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

Thompson v. Pacific R. R. 9 Wall, 591.

P. PHILLIPS,

For Defendant in Error.

The act of February 14, 1867, sec. 2, (14 Stats., 385,) gives this court jurisdiction, "*where any privilege or immunity is claimed under the Constitution or any statute of the United States.*"

This grant of power was not, in terms, contained in the 25th section of the act of 1789; and it is to be inferred that, by this later enactment, Congress intended to remove all possible doubts as to jurisdiction over such a claim.

The inquiry therefore is, whether an immunity from this State tax was so claimed in this case.

1. It is not necessary that it should have been claimed in express words. It is sufficient if the claim can be inferred, with legal certainty, from the record of the State court.

Bridge Pros. *v.* Hoboken Co., 1 Wall., 116.
Furman *v.* Nichol, 8 Wall., 44.
Dooley *v.* Smith, 13 Wall., 604.

This is in conformity with the earlier decisions.
Miller *v.* Nichols, 4 Wheat., 311.
Craig *v.* Missouri, 4 Peters, 410.
Satterlee *v.* Mathewson, 2 Peters, 380.

The question is whether it is a *legal intendment*, from this record, that a privilege or immunity was claimed under the Constitution or laws of the United States, and denied by the highest court of the State.

The agreed case (p. 5) states: "Said company insists," &c.

Unaided by the opinion of the court, this shows a claim of immunity under *some* constitution. Will this court intend it was under the State constitution, which can have no possible reference to the subject, or to the acts of

Congress mentioned in the immediate context, or under the Constitution of the United States, and the acts of Congress passed in pursuance thereof. Legal intendments should be sensible and reasonable, and not strained, so as to violate all reasonable hypotheses.

2. It was early decided that, in cases coming from Louisiana, the statement of facts and the opinion of the court were to be examined, to learn what questions were made in the State court.

Armstrong *v.* Treasurer, &c., 16 Pet., 285.
Grand Gulf R. R. *v.* Marshall, 12 H., 165.

And when the clerk in the case certifies *the opinion of the court on a statement of facts* as part of the proceedings, it is submitted the same rule should exist in reference to all the States.

Craig *v.* Missouri, 4 Pet., 410.

3. The second section of the act of 1867, by omitting the requirement of the 25th section of the act of 1789, that it should appear *by the record* that a jurisdictional question arose, has enabled the court to examine the recorded opinion of the State court, upon an agreed statement of facts, sent up as part of the proceedings on which the judgment was founded.

Phillips ou for p 117 —

Page 5. record - Brahms
Furnishers

12 Wallace
Stevens + Mason —

13. Wallace Sibley & Smith 64 —

8 Wallace Furniture Mfrs

7 Howard 40 —
(Original between
Rooms)

13 - SA/11 — 2 SV Lea
— 78 —

14 SV - p 121

T. Wallace = 113 =

Supreme Court of the U. S.

FRANK R. OSBORNE, Agent of the Southern Express Company,

vs.

The MAYOR, &c., of the City of Mobile.

ARGUMENT OF MR. CURTIS

FOR THE PLAINTIFF IN ERROR.

Dec. 7, 1872

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1873.

SUPREME COURT OF THE U. S.

FRANK R. OSBORNE, AGENT OF THE SOUTHERN EXPRESS COMPANY,

vs.

THE MAYOR, &C., OF THE CITY OF MOBILE.

ARGUMENT OF MR. CURTIS

FOR THE PLAINTIFF IN ERROR.

NEW YORK :
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ARGUMENT OF MR. CURTIS.

May it please your Honors:

My brother Phillips has suggested, and I have no doubt of the soundness of the suggestion, that if the Act of February 14th 1867, touching the jurisdiction of this Court, goes at all beyond the constitutional grant of judicial power to the United States, it must be inoperative. That is plain. But, it is equally plain, that this Act of February 14th 1867,—the clause of this Act that I rely upon—is within that grant of judicial power. It provides that this Court shall have appellate jurisdiction over the Courts of the States, "where any privilege or immunity is claimed under the Constitution, or any Statute of the United States."

Now it is certainty true, that the claim of a privilege or immunity, under the Constitution, or any Statute of the United States, must present a case arising under the Constitution of the United States. If the defendants in this case duly claimed, before the State Court, immunity from this taxation, by reason of any clause in the Constitution of the United States, or, by reason of any Statute of the United States, that was a case arising under the Constitution or Statute of the

United States. Then we turn to the language of the Act of February 14th 1867, by which jurisdiction has been conferred on this Court, and find that if this Court finds, in the record, a claim of such immunity, they have a case for their jurisdiction.

Now, this grant of power, precisely in the terms in which it is made by the Act of 1867, was not made by the judiciary Act of 1789. I do not mean to say it was not made there in substance. I do not mean to say that it could not fairly be deduced from the words used in that Act; but the language was different, and Congress having industriously changed the language, I submit could have done so only for the purpose of leaving no doubt in the minds of this Court that they had jurisdiction, if such a claim of immunity under the Constitution, or an Act of Congress could be legally intended from the transcript before them.

In the first place, it had been settled by repeated decisions of this Court, one of which goes back as far as the 4th of Wheaton, repeated in 2d Peters, and again in 4th Peters, 1st Wallace, 8th Wallace, and 13th Wallace, that it is not necessary, under the 25th Section of the Act of 1789, that the Court should find a claim of immunity under the Constitution, or some Statute of the United States, in express words. All that is needful is, that the Court, looking at the record, should be able to infer, as a legal intendment,

that such a question was made, and was decided unfavorably to the party who made it.

And the same thing is true, according to the repeated decisions of this Court, of what is necessary to jurisdiction depending upon the character of the parties. In 8th Wallace, and again in 10th Wallace, it was decided by this Court that it was not necessary to say, in so many words, that one party was a citizen of one State, and another of another State. It was sufficient if, from the facts stated, there was a reasonable and fair inference that such was the citizenship of the parties. So in this case, if the Court, looking into this record, should be able to draw, as a reasonable inference from what they there see, that there was a claim of immunity under the Constitution or Statute of the United States, then, I submit, you will take jurisdiction.

Now, it is a very important consideration, that the parties agreed on a statement of facts, to which the Court was to apply the law.

In the case of Craig *vs.* Missouri, in the 4th of Peters, Chief Justice Marshal, in considering the question, whether there was enough in the record to show that the Court had jurisdiction, uses this language:

"There was no jury to find the facts, and refer the law to the Court; but if the Court, which was substituted for the jury, has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the Court, then,

substituting itself for a jury, placed facts upon the record, which, connected with the pleadings, show that the act, in pursuance of which this note was executed, was drawn into question, on the ground of its repugnancy to the Constitution. After finding that the defendants did assume upon themselves, &c., the Court proceeds to find, "that the consideration for which the writing declared upon, and the assumpsit was made, was the loan of loan office certificates, loaned by the State at her loan office at Chareton, which certificates were issued, and the loan made in the manner pointed out by an Act of the Legislature of said State of Missouri, approved 27th of June 1821, entitled, &c." Why did not the Court stop, immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan office certificates, issued under the Act contended to be unconstitutional, and loaned in pursuance of that Act, if the matter thus found was irrelevant to the question they were to decide?"

Then he goes on to show that the only reason for this finding was, that by it, a question under the Constitution of the United States, that States shall not emit bills of credit, would arise. That is, he looks into the facts found by the Court, to see whether a Constitutional question arises under those facts. He reasons that if it does, and there be no reason for putting the facts there except to raise that question, it is

a reasonable inference they were put there for that purpose, and the question was raised.

Now, in this case, why is it that these parties have agreed upon certain facts concerning the nature of this business? Why is it that they have informed the Court, as the basis of its decision, that the business of this company was inter-State and foreign commerce? And why have they concluded their statement of facts by the declaration that immunity was claimed against this tax under the Constitution, and also under Acts of Congress?

I respectfully submit, that even under the 25th Section of the Act of 1789, this would be amply sufficient. But, I follow the suggestion made by the learned counsel, who so thoroughly understands and has so fully considered the subject of the jurisdiction of this Court, that the Act of 1867 has made a change; that it is no longer necessary that the Court should look into the technical record only. That they have a right to examine anything which comes up as a part of the transcript of the proceedings in the Court below, which is duly certified, and if they can find enough there to satisfy them that the question there arose, and was decided, and how it must have been decided, that is sufficient.

It is not strictly true, as my friend on the other side said, that a Court of Errors must necessarily confine itself to the transcript of the proceedings of the Court below, even on a question of its jurisdiction. This

Court does not so confine itself upon every question of jurisdiction. For instance, if the transcript from below does not show that more than $2,000 was in controversy; if it was, for instance, a case of replevin, or a proceeding to try the title to a vessel, this Court will receive affidavits to show what the value was, and that it reached the jurisdictional amount. That has been settled by a series of decisions, and there is no limitation of this indulgence given to parties in order to evidence the jurisdiction of this Court, except that they must apply within a reasonable time, and that the testimony must be in itself sufficient.

I pass from this question of jurisdiction to what little it seems to be needful for me to say upon the merits of the case:

In the first place, I conceive it to be of great importance for the Court to have in mind and keep clearly in view, for what business this ordinance requires a license to be purchased. The ordinance itself, to a certain extent, answers the question. "Every Express Company * * * who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay, &c." The requirement of the ordinance is, that in order to do the business of an Express Company, extending from the city of Mobile beyond the limits of the State, this required license must be purchased.

But the facts go a little further. They show what the business of this Express Company is. They show

that its business is to transport merchandise to and from Mobile, or between Mobile and points out of the State; and, also, as I should infer from some of the language, foreign countries. But I shall come to that in another connection.

It shows that the business of this Company, as carried on in the city of Mobile, includes certain acts. And what are they? They are, first, to enter into contracts, to assume upon themselves the obligations of common carriers, to transport merchandise from the city of Mobile to points beyond the State; and, also, to enter into similar contracts beyond the city to transport merchandise to the city of Mobile. That entering into these contracts to make the transportation is, therefore, a part of what is done within the limits of the city of Mobile, and it is to this, among other things, that this requirement of a license applies.

In the next place, they receive the merchandise. They place it *en route* for its destination by railroad, or by steamboat. If merchandise is sent to Mobile, so much of the transit as takes place within the limits of that city until the consignee receives the merchandise, is also done within the city of Mobile. It is then, for the privilege or faculty of making contracts in the city of Mobile to transport merchandise beyond the limits of the city, and to receive merchandise under similar contracts made out of the State, and for the transit, or so much of it as is made within the limits of the city of Mobile—it is for the privilege

or faculty of doing that business that this license is required.

Now, I agree that these are but parts of what constitute, when all the parts are united, inter-State commerce. But they are essential parts of it. And the whole, which is made up of these and other essential parts, is inter-State commerce; and the moment a contract is made to carry merchandise, that moment a contract is made to enter into and transact inter-State commerce; and when the merchandise is received by the carrier, and begins to move towards its destination beyond the State, inter-State commerce has begun.

That was the decision of this Court in the case of the Daniel Ball, in 10th Wallace. There the steamer did not ply beyond the limits of the State of Michigan, but the steamer was carrying goods destined beyond that State, and then another carrier was to intervene, and so they were to reach their destination. But this Court decided that the division of the transit into different parts did not change the character of the commerce which that vessel was carrying on.

So here, although this carrier performs but a portion of what is inter-State commerce, within the limits of the city of Mobile, it is an essential portion, without which it cannot be carried on; and therefore, if anything is under the protection of the Constitution and laws of the United States, this portion is under that protection. I suppose it cannot be doubted that a law requiring a person engaged in a particular

business to take out a license, in order to confer on him the faculty or privilege of conducting that business, is a regulation of that business. That, I suppose, no argument will make plainer than the statement itself; and when this ordinance requires a person, in order to acquire the faculty or privilege of conducting this part of inter-State commerce, to take out a license and pay for it, that is a regulation of inter-State commerce.

Now, this being so, may it please your Honors, the next inquiry is, whether it is such a regulation of inter-State commerce as comes within the commercial clause of the Constitution, and is protected thereby against State interference?

My learned friend has read from some of the reports of this Court made some time since, at a period when there was great conflict of opinion among the different Judges. But, if I understand the matter, that conflict has to a very great extent, if not altogether, ceased. I suppose the doctrine which this Court now follows, and which has been put forth in several cases—I have not a memorandum of them before me—is found stated, not so fully as afterwards, but indicated in the 12th of Howard, page 319. The substance of that is, that the power to regulate commerce embraces a vast field, containing many and exceedingly various subjects quite unlike in their nature; and, therefore, though it cannot be either affirmed or denied absolutely that the mere existence of this power in the Constitution prevents

States from legislating on any part of this subject, yet, where the nature of the subject in question is one which is national—which alike concerns the entire people of the United States, which demands a single uniform rule—then it belongs to Congress to make that rule, either by an act declaring what it is, or by its silence leaving the subject free.

Now, this being so, can there be the least doubt that inter-State commerce is national; that it concerns the whole nation; that it admits of only one uniform regulation, and that Congress by its silence has decreed it should be free? What, then, is this inquiry that I am now addressing to the Court? Congress has by its silence, if not by the acts, to which I shall advert hereafter—it has by its silence, at least, caused it to be understood that inter-State commerce is to be free. What does this ordinance say? Although the Constitution and the abstinence of Congress have conferred upon every citizen the right freely to carry on inter-State commerce, *you* shall not carry it on, *you* shall not have the privilege of carrying it on, or the faculty of carrying it on, unless *you* pay $500 for a license. Is there not a direct conflict between the Constitution, which has committed this subject to Congress, and the will of Congress, as manifested throughout the history of the country, to have this commerce free? Is there not a direct conflict between that and the requirement of the State law, that this privilege shall not be exercised without the payment for a license?

I understand the decision in the case of Brown *vs.* Maryland to have gone the whole length which we desire this Court to go on this occasion. That decision is put upon two grounds. One is, that the tax upon the occupation of an importer is a tax upon imports; and the other is, that the tax upon the occupation of an importer is in conflict with this commercial clause of the Constitution of the United States.

The facts find that this business was to be carried on by this Company by steamboats and railroads. These steamboats, of course, were licensed and enrolled, and the owners of every one of them held an express permission from Congress to sail between port and port, and to contract for carrying a cargo, and to carry and deliver it.

As Chief Justice Marshal said, in Brown *vs.* Maryland, repeating what he had said before in the case of Gibbons *vs.* Ogden, these laws of the United States don't stop at the limit of the State, or of the municipality. They enter it, and they are to be executed as much within those limits as on the high seas.

Now, when an express company goes to the owner of a steamboat, and contracts with him to receive a baggage crate on board belonging to the express company, and loaded with merchandise which the company is transporting without the State, has not the owner of that steamboat derived from Congress power to make such a contract with him, and to receive it on board and carry it for him? Is it not, in truth, a chartering

by the express company of so much of the steamer as the express company desires to use, or finds necessary for its occasions? And if they may charter the whole, may they not charter a part; and if the charter of the whole is under the protection of these laws of Congress, why is not the charter of a part under such protection? And how can any business, which is to be conducted between the States by means of registered and enrolled vessels, be prohibited by the State, unless a license is taken from the State.

It is going back very near to Gibbons *vs.* Ogden; very near. That was the case where the State of New York prohibited steamers from plying on waters within the limits of the State without a grant from the State. That was held to be inoperative.

Now, here the State says to every express company: You must take a license, in order to authorize you to charter a part of a steamboat to carry on inter-State commerce. So with the railroads. My learned friend has made himself somewhat merry at the expense of this railroad law, the origin and history of which he seems to think so mysterious. Well, it is plain enough on its face. Indeed, my friend seems to think it is so plain that it don't amount to much; but it is an express declaration that the business of these railroads in carrying passengers and transporting merchandise between the States is to be free. And therefore I repeat, if any express declaration of Congress be needful in addition to the uniform and universal understanding

that inter-State trade is to be free—if any express declaration is wanted—we find it here.

It is suggested, however, that this may in some way trench upon the State right of taxation, and some authorities have been read to show how broad—nay, how complete, with one or two exceptions—this State right of taxation is.

Well, I agree. The State has the same rights, the same power to tax, that it had before the Constitution was formed, except so far as the Constitution restrains them. That I agree to. They cannot levy a tonnage duty, because the Constitution has prohibited it, but they may tax ships as property, as this Court has said, and as has been uniformly practised.

They may tax any instrument of commerce.

JUSTICE CLIFFORD: At their home ports?

Mr. CURTIS: Certainly, they may treat them as parts of the mass of the property of the State where they belong, and tax them accordingly. They cannot, as I say, levy tonnage duty, because the Constitution has prohibited it.

So, in regard to imports, when they become part of the mass of the property of the State where they are sent, and so of exports. But the Constitution has prohibited the States from laying any duty upon imports or exports, and therefore they cannot resort to that form of taxation. But when they have been mingled with the mass of the property of the State, or before they are severed from it by the act of exporta-

tion, they may be treated as property, and taxed accordingly.

But that has nothing to do, as your Honors see, with this case. This is not a tax on property. There is no attempt to reach property by means of this tax. It is a tax on a privilege, or faculty, or franchise, or whatever it may be called, to do a certain business. The Company may be the owners of a million of dollars; the taxation is the same. They may own nothing. I think it is not necessary that an express company should own its offices, or its drays, or anything. They may hire. It may therefore, I say, own nothing. The taxation is the same, because it is not a tax on their property—it is a tax on the faculty to conduct this business.

Now, my learned friend says that there is a difficulty here, arising out of the fact that all these corporations, all these express companies, are taxed alike, and he says, how absurd it would be if a State—the State of Alabama, for instance—could not tax their own corporations which were doing an express business. Well, I agree they can. They create a corporation. They grant to it all the franchises it receives. They withhold such as they please to withhold. They impose such conditions as they please to impose for what they grant. There is no difficulty about that in my apprehension. The State of Alabama might provide, if it pleased, that every express company created by it, and every corporation, should pay one-half of its profits

into the State Treasury. It may withhold the franchise to conduct the business at all. It may impose, as I have said, such conditions on the grant of that franchise as it sees fit. But when you come to this corporation, not created by the State of Alabama, and a corporation transacting a business which the State of Alabama has no right or power to exclude from its limits, then you have a totally different case. In the case of Paul *vs.* Virginia, as your Honors will remember, there were three questions. One was, whether a New York Insurance Company, doing business within the limits of Virginia, could claim the privilege of a citizen, and insist upon equality of taxation between themselves and the domestic companies? The Court decided they could not. The other question was, whether the business of corporations was not as much under the protection of the Constitution of the United States as the business of individuals; and the Court held it was. It held that if a corporation was carrying on inter-State or foreign commerce, by owning steamboats, or in any other way, they were as much under the protection of the commercial clause of the Constitution as if they were individual owners. But, then, the difficulty arose in that case, that this corporation was not carrying on inter-State commerce, and there we failed. If we could have satisfied this Court that issuing policies of insurance upon merchandise could be deemed to be commerce, we should have succeeded, according to the opinion of this Court, in that case.

And that is the position of this Georgia corporation. They are chartered by the State of Georgia, with authority to carry on inter-State commerce, and the State of Alabama has no power to exclude them from carrying it on within the limits of that State, because it is a part of the United States, and the whole territory is covered and protected by that clause in the Constitution.

I wish to say a few words concerning those facts which refer to foreign exports and imports. I understand the agreed facts to mean that this company, transports, among other things, merchandise imported from abroad, and exported abroad; and I do not, myself, see any reason to doubt the intention of the parties was to agree that to that extent this corporation acted in the course of the transit of merchandise exported and of merchandise imported. Take the case which Justice Bradley mentions: Merchandise is imported into Mobile destined to Montgomery; it would be necessary for this express company to interpose and conduct the transit to the place of the consignee. That I suppose to be the meaning; and in reference to exports, I suppose it means that they might get cotton anywhere out of the State, bring it to Mobile, and ship it from thence abroad.

So that the same question would arise there, as I have already spoken of. A part of the transit, to be sure, is within the State; but the character of the transaction is one of foreign commerce.

And, if that be so, then, according to the decision in the case of Brown *vs.* Maryland, a tax upon the occupation of an importer is a tax upon the occupation of an importer, is a tax upon imports. A tax upon the occupation of the carrier of imports or exports is a tax on those imports or exports.

I believe, may it please your Honors, this is all I need to say, and I thank the Court for its patient attention.

Supreme Court of the U. S.

FRANK R. OSBORNE, Agent of the Southern Express Company,

vs.

The MAYOR, &c., of the City of Mobile.

ARGUMENT OF MR. SEWARD

FOR THE PLAINTIFF IN ERROR.

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ARGUMENT OF MR. SEWARD.

May it please your Honors:

The record in this case correctly advises you by its brevity, that the question involved lies in a narrow compass. It arises in this wise:

The Southern Express Company is a corporation created by the laws of the State of Georgia, and has its principal place of business at Augusta, in that State. In 1869, it was engaged as a common carrier in the transportation of goods, wares, and merchandize, from places within and beyond the limits of the State of Alabama, to the city of Mobile, and from the City of Mobile to places beyond the limits of the State of Alabama. These goods, wares, and merchandize were of the same general character as are usually transported by common carriers.

The Company had an office in the City of Mobile. The plaintiff in error was the agent of the Company at that office. The defendant in error—the municipal organization known as the Mayor and Common Council of the City of Mobile—passed in March, 1868, under and pursuant to the provisions of the City Charter, an ordinance, upon which the question in this case arises.

That ordinance, provided among other things, as follows :

"Every Express Company or Railroad Company who shall do business in the City of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred dollars, which shall be deemed a first grade license ; if within the limits of the State, one hundred dollars and shall be deemed a second grade license ; and if within the limits of the City of Mobile, fifty dollars, which shall be deemed a third grade license. Any person or persons, or incorporated company doing business or pursuing any vocation without obtaining the proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine not exceeding fifty dollars, for each and every day's violation thereof, to be imposed by the Mayor, and collected as other fines."

The agent of the Express Company at Mobile, did not pay this five hundred dollars, and for that reason he was arrested and tried by the Mayor, in the language of the complaint made against him, "for doing business without a license," and the result of the trial is very tersely and compactly stated in the Mayor's judgment, which was in the fewest possible words, "twenty-five dollars or twenty-five days."

Upon the rendition of this judgment, a civil suit was commenced by the City, in the Circuit Court of Mobile County, against the plaintiff in error, to recover

this penalty. The plaintiff in error appeared in the suit, and pleaded shortly, as it is termed in the record, and an agreed statement of facts was signed by the counsel for both parties, and presented as the evidence in the case. Such agreed statement set up in brief terms the organization of the defendant's company, under the Laws of the State of Georgia, and the character of the business of the company, and alleged at its close that the Express Company insisted that such license tax was, as to it, unconstitutional; that it was contrary to the Acts of Congress relating to commerce and imports, and that the company was not bound to pay the same. This was the sole question presented for the judgment of the Circuit Court. The judgment of that Court was rendered against the Express Company, and to its ruling a bill of exceptions was tendered and allowed, and an appeal taken thereon to the Supreme Court of the State of Alabama. That Court affirmed the judgment below, and from that judgment of affirmance, a writ of error was allowed by the Chief Justice of the Supreme Court of Alabama to this Court, which brings this record here for examination.

Obviously the question which arises *in limine* and which is suggested in the brief on the other side as lying at the threshold of the case, is that of the appellate jurisdiction of this Court over the question raised by the record.

It is maintained on the part of the plaintiff in error,

that such jurisdiction exists as well under the 25th Section of the Judiciary Act of 1789, as under the Act of February 14th, 1867.

First. As to the Jndiciary Act of 1789. That Act, as as your Honors recollect, requires that the question to be passed upon by this tribunal should appear upon the record, and therefore the inquiry now is, does this question, which we seek to submit to the arbitrament of your Honors, appear upon the record so as to be obvious to the judicial eye. In the first place, there is the allegation in the agreed statement of facts, that the ordinance in question is "unconstitional." There is also the further suggestion that it violates the Acts of Congress relating to duties upon imports and exports. This much appears upon the record, and the case therefore necessarily suggests, "by intendment," as your Honors have said, that the question of the constitutionality of this ordinance was raised and passed upon in the Court below. But we are not limited to the agreed statement of facts for the only evidence contained in the record that this question arose, and was passed upon by the Circuit Court. The judgment of the Supreme Court of Alabama is found in the record, and decides three matters: First. "That the record and matters therein assigned as error, having been submitted on the briefs of the parties, and duly examined and understood by the Court, it seems to this Court that there is no error in the record and proceedings of said Circuit Court of Mobile County."

That is a statement of fact, that the cause was submitted upon printed briefs, which assigned error in the judgment of the Circuit Court of Mobile County. That judgment is preceded by the "opinion of the Court."

I am aware of the decision pronounced so far back as the 12th of Wheaton, that this Court will not, for the purpose of grasping jurisdiction, look into the opinion of the Court below, but I think your Honors will find in every case where that has been adjudged to be the rule, that the opinion came before the Court *aliunde*, and *dehors* the record; that it was brought up in one of the most noted cases by *certiorari*, to which the clerk returned that he "found upon the files of the Court below, an opinion in the words and figures following." The Court rejected that opinion as affording any ground of jurisdiction, but at the same time it looked at the opinion in order to ascertain what was really the point involved.

This present record is certified by the Clerk of the Supreme Court "to contain a true, full and complete transcript of the proceedings had in the Supreme Court of Alabama." That record, as we suppose, imports absolute verity at least to this extent, that it correctly indicates to this Court that the record in the Supreme Court of Alabama contains the opinion which was the foundation of the judgment rendered; in other words, that the Supreme Court of the State of Alabama has prescribed by its rules that the opinion

upon which its judgment is rendered shall constitute a portion of the judgement record, and it returns it to this Court as a portion of the record remaining on file in the highest Court of the State of Alabama. Your Honors have been advised by preceding cases, which have been decided and reported, that this is a practice which obtains in Alabama, and in a case which is reported against this same defendant in error (Waring *vs.* The Mayor, &c.), the record shows that the opinions of all the judges, even of those who did not concur in the decision, were transmitted to this Court as a portion of the record remaining in the Supreme Court of the State of Alabama. A subsequent case yet to be argued (No. 529), also shows that this practice always obtains in the State of Alabama.

But if the opinion of the Court below is not to be regarded by this Court when it contemplates this record judicially, we say that the question within the decisions of this Court is presented by the agreed statement of facts, so that this Court can take cognizance of it, under the 25th Section of the Judiciary Act.

Second.—But failing in that, then we contend, that the Act of 1867, which dispenses with the necessity of the presentation of the question in actual words upon the record, and leaves it to be gathered from an inspection of the whole case, gives this Court jurisdiction to entertain and decide the question now presented. This is contended upon these grounds:

The proceeding which is brought here for review, is a "suit" brought by the defendant in error, the final determination of which was a "judgment," and which judgment was affirmed by "the highest appellate tribunal in the State." The plea of the plaintiff in error, in the Court below, was, that his employer, the Southern Express Company, a corporation created by the laws of the State of Georgia, had a lawful right to carry merchandize from the State of Alabama and the City of Mobile to the full extent of the Company's territory, wtihout paying the prescribed license tax; that the ordinance in question gave no lawful authority to arrest or to fine the agent for having neglected or refused to obtain a license or to pay the tax therefor; that such ordinance was in violation of the provisions of the Constitution, and also of the Acts of Congress in relation to commerce and imports.

Now, when your Honors come to analyze this fully, it seems to present three grounds upon which the plea reposed:

First.—It claimed an authority, under the Constitution, to transport goods, wares, and merchandize to and from the State of Alabama, without paying the State, or any of its municipal corporations, a license fee for the privilege of so doing.

Second.—That the authority claimed by the Mayor, to exact the license fee by his brief sentence, was one which was contrary to the laws and the Constitution of the United States.

Third.—That the defendant below, the plaintiff here, had a privilege and immunity under the Constitution of the United States, to transact the business of inter-state commerce, without submitting to municipal taxation therefor. The overruling of this plea brought the case directly within the provisions of the Act of 1867. We contend, therefore, in the first place, that this Court has jurisdiction of this appeal; and, secondly, that the judgment below should be reversed, and, briefly, for these reasons:

First.—The Constitution of the United States gives to Congress power "to regulate commerce among the several States." This power is admitted to be exclusive of the exercise of a similar power on behalf of any State, or of any municipal corporation which may be a component part of the State, whenever Congress has exercised the power which has been conferred upon it. On this point we have cited in our brief the decisions of your Honors. But we think we have also the authority of this Court for saying that the Constitutional power is exclusive, whether exercised by Congress or not, whenever the subject matter which the State assumes to regulate is of national concern. In the case of the Board of Portwardens, your Honor said: "Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation on the part of Congress." This admits that it would be improper

for the State, even if Congress had not legislated, to assume to invade this domain which is confided solely to Congress. But we have been told by this Court further, that in addition to the express grant contained in the Constitution, there are certain prohibitions, which result by necessary implication. In the late case of Ward *vs.* Maryland, your Honors say: "Implied prohibitions restricting the power of the States also exist, which are as effectual to that end as those which are expressed, and where the nature of the power granted, or the terms in which the grant is made, are of a character to show that State legislation upon the subject would be repugnant to the Federal grant, the power of Congress over the given subject is exclusive of similar powers existing in the States."

Second: If it can be properly assumed that the ordinances in question affect the commerce of the nation, then they intrench upon the exclusive domain of the Congressional power, and their adoption and enforcement as against the plaintiff in error cannot be justified.

What is commerce? Your reports have told us, in a sentence, which once heard is never forgotten, that "commerce is intercourse." But intercourse implies some means of conduct. It implies vehicles, instrumentalities, and agencies. And we think that whatever the interests of intercourse require to be used for its safe and proper conduct is within the protection of the Constitution. The Constitution provides in express terms that no vessel bound from one State to another shall be obliged

to enter, clear, or pay duties in another. Your Honors recall the fact that human ingenuity and human science at the date of the adoption of the Constitution had not extracted from water its most potent element, steam; and that all that was known to the framers of the Constitution by which a vessel could be propelled was the action of the air, or the more gentle action of the current. Therefore, there was known practically at the date of the Constitution but two means of inter-state communication, one by the coasting trade, the other by the currents of the rivers, and so far as those means then existed they were most tenderly cared for by the Constitution, and prohibited from being interfered with or arrested by State prohibitions or restrictions. Now the same principle would seem to apply to the new means which have been devised by the introduction of steam—those means, which are the hand-maids of commerce, and without which her labors would be useless. If it is unconstitutional that a vessel bound from Boston, touching at New York, Philadelphia, Norfolk, Savannah and New Orleans, should be compelled to pay $500 for the privilege of entering into and departing from each port, is not the principle which protects such vessel also to be applied to the coasting railway which runs along the coast, stopping at each of these ports, and almost within sight of the white wings of the sailing vessel? . What good reason is there for insuring to sailing vessels freedom from State taxation, that does

not equally apply to the vehicles of inter-state land transportation?

There early commenced in the history of this Court and of the Constitution, a struggle to limit the application of the Constitution to that particular class of vessels which was known at the time of the adoption of the Constitution, and the early decisions of this Court take up one by one the different new modes which were invented of carrying on the inter-state trade of our country, and declared them to be as much within the protection of the Constitution as the sailing vessel. One illustration may suffice. This Court has decided that steamboats are within the protection of the Constitutional provision.

In the early case of Evans *vs.* Ogden, the Court said "the power of regulating commerce extends as well to vessels employed entirely in carrying passengers as to those engaged in the transportation of property, and applies equally to those propelled by steam or fire, as to those navigated by the instrumentality of winds and sails." This was said in answer to the doctrine of the strict constructionists of that day, that the Constitution protected only vessels which were propelled by winds and sails. In the late case of the Daniel Ball your Honors said that a steamboat which did not run beyond the limits of the State was protected from State interference. Therefore, we assume that those engaged in inter-state commerce have a right to avail themselves of all the instrumentalities and agencies

which science has produced, or which the necessity of the case requires, and that there is nothing in the fact that they are steam agencies used upon the land, which takes them from under the Constitution and leaves them subject to State control. And your Honors have also held that this same provision protects the persons of the agents.

Third.—What is that "national commerce" over which Congress has complete and exclusive control? That is defined by the Constitution with precision. It is "commerce with foreign nations, and among the several States." That is the commerce the control of which has been confined exclusively to Congress. That is the kind of commerce which the record shows this Southern Express Company was engaged in at the time of the application to its agent of this particular ordinance of the City of Mobile. The record states that it was carrying freights, wares and merchandise from the interior of Alabama to other States in the Union, and from other States in the Union to the City of Mobile, in the State of Alabama. Therefore, it was literally engaged in that which is "commerce among the States." The record also shows that it was carrying on this commerce by means of railroads and steamboats.

Your Honors said, in the case of the Daniel Ball, that "whenever a commodity has begun to move, as an article of trade, from one State to another, commerce in that commodity, between the States, has com-

menced. However limited this commerce may be, it is subject to the regulations of Congress. To the extent to which such agency acts in that transportation, it is subject to the regulations of Congress." And this was said, though the Daniel Ball, which gave the name to the case, was a steamboat whose journeys did not extend beyond the limits of the State. The ordinance which we call in question here, is aimed directly at this transportation of commodities —at this inter-state commerce—because its language is: "Every Express Company or Railroad Company who shall do business in the City of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license fee of five hundred dollars." That is made the test of the amount to be paid. If the business extends beyond the limits of the State, it is to pay five hundred dollars, while that business which is within the limits of the State is to pay only one hundred dollars.

Therefore, this ordinance has a direct application to what is purely inter-state commerce. We submit that a State has no power to regulate a commerce which extends beyond its jurisdiction—that it has no power to undertake to regulate it by imposing upon it a pecuniary burden, to be paid out of that which is earned beyond the limits of the State.

The Court below, in its opinion, which I suppose counsel may refer to, says that "This license tax was levied upon the Express Company for the privi-

lege of carrying on business in the City of Mobile." This, then, is a tax for the privilege of doing business, and, in common parlance, is to be paid out of the business if the profits will afford it, and if carried to too great an extent operates to prevent the business. It is therefore virtually a tax imposed upon the things which are carried for the privilege of carrying them.

We submit that the language of your Honors in the Passenger Cases would seem to be decisive against the right of the City of Mobile, thus to impose this burden upon inter-state commerce, because the Court there said: "Congress has regulated commerce between the several States, by willing, that it shall be free. It is, therefore, not left to the discretion of each State in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it." That was the declaration of this Court, and it is the platform upon which we stood in the Court below, and upon which we stand here to-day, and ask your Honors to enforce in this case the principle of the judgment of the Court in the case just cited, and to re-affirm that it is not left to the discretion of each State to exact a duty for permission to exercise and practice inter-state commerce.

In McCulloch *vs.* Maryland, this Court uttered another sentence which also lives; that "the power to tax involves the power to destroy." That was the judgment of this Court as to the ultimate effect of

taxation—that it involved the power to destroy. It is a right which in its nature knows no limits, and may be carried to any extent within the jurisdiction of the State or corporation which imposes it. In the case of The Collector *vs.* Day, your Honors said: "The Legislature of the Union can alone be trusted by the people with the power of controlling the measures which concern all."

Now regard the case for a moment practically. The Express Companies reach all points where the demands of commerce make their presence justifiable or necessary, and there is hardly a municipality within the territory of the Federal Government which is not reached and served by some Express Company. Is it logical to say that the goods started from Bangor *en route* to New Orleans *via* the rail or *via* the rivers, are to be stopped by each local Cæsar and compelled to pay tribute to him, to the extent to which the necessities of his particular corporation may require? If any such rule of law is to be declared applicable, there seems to be no limit to the burden which may be imposed upon these common carriers between the different States, and though it may seem a figure of speech to suppose that they would be carried to the extent of interfering totally with inter-state communication, yet it is no figure of speech to suppose that necessities may arise for home revenue requiring payments which the business of the Companies would not warrant; and commerce, if it is to be submitted to

this burdensome taxation at every step as it passes from town to city, and county to county, and State to State, may as well withdraw her vehicles and cease her endeavors.

Fourth. In the next place, the record shows that the business of this Company is that of carrying exports from the state of Alabama, and bringing into the State of Alabama imports, in the sense in which those two words are used in the Constitution. If there be stripped from the record, any assertion as to the character of the business of the Company except this "transportation of exports and imports," your Honors will at once see that the requirement of this license fee would be a direct tax upon exports and imports. *Non constat* but that the business of the Company might be reduced to this single class of transportation, and if it had no other business than this, the exaction of five hundred dollars for the privilege of carrying it on, would be a direct tax upon the articles exported and imported, and therefore violative of the Constitution.

Again. The record shows, that the business of the Express Company is carried on by railroads and steamboats. If, for illustration, the Company had in its employment but one steamboat upon the Gulf, whose other port or terminus was the city of New Orleans, as it well might be, then this five hundred dollar tax is exacted from the Express Company for the privilege of entering the port of Mobile, and it therefore violates

that section of the Constitution to which I have already referred, that no State shall exact any fee for the privilege of entering or leaving a port.

These views, thus briefly stated, are apparently not without the sanction of both State and Federal Courts. New Jersey passed a very similar law, levying a tax upon property *in transitu* by the Erie Railroad from Jersey City across the State to the State line, bound to its Westward destination. The Erie Railroad Company refused to pay the tax, on the ground that it was unconstitutional, and the case was decided by the Court of Errors in New Jersey, adversely to the right of the State to impose such a tax upon inter-state commerce, the Court saying, that the law in question was a direct interference with the Constitutional grant of power to Congress.

California passed a Statute which required a stamp to be taken out by all passenger companies doing business in that State, predicated in its value of the amount of passage money paid by the passenger, and the Court held that that Statute was to be regarded in no other light than as a tax on a contract of passage, and that it was unconstitutional because it violated the provisions of the Constitution to which I have already referred.

Louisiana passed an Act imposing a tax upon sales of property sent by citizens of other States of the Union to the city of New Orleans for sale in bulk. Some citizen protested against that, and the Court held that

the State could not legally tax the property brought from other States of the Union for sale or re-shipment, until it had been mixed with, and formed a part of, the common mass of property in the State. The opinion rendered in that case is as follows: "the doctrine that the States have a concurrent power with Congress to regulate commerce between the States, would seem to involve the very difficulty which it was obviously the purpose of the framers of the Constitution to provide against."

In Ward *vs.* Maryland, your Honors held that the Constitution plainly and unmistakably secures and protects the right of a citizen of one State to pass into another State of the Union for the purpose of engaging in legal commerce or trade without molestation. *Non constat* in this case, whether this particular plaintiff in error was a citizen of Alabama or not; but those who stood behind him were citizens, in one sense of the term, of the State of Georgia, suable there as such, though not citizens under the decision of your Honors for the purpose of claiming the right of citizens under another section of the Constitution. But what is the object of giving this freedom to individuals to pass to and fro, unless that which is the object of their journey is protected as well as their persons? What is the object of exonerating the person if the exoneration does not extend to the business of the person? It only shifts the ground of the application, and leaves the business to pay that which cannot be lawfully imposed

upon the person who conducts it. Your Honors further said, that "inequality of burdens, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the federation, and the new Constitution was adopted, among other things, to remedy these defects in the prior system."

In Paul *vs.* Virginia, your Honors said, that the power to regulate commerce embraces, and refers to, and includes, "as well, commerce carried on by corporations as that carried on by individuals;" and therefore it embraces the commerce of which this Southern Express Company is one of the instrumentalities. The Court held in that case that the issuance of a policy of insurance was not a commercial transaction, but clearly its reasoning would have led inevitably to the conclusion that the tax complained of in that case was illegal and unconstitutional, if the Court had been of opinion that a policy of insurance was so allied with commerce as to be called one of its instrumentalities.

In the California case of Almy *vs.* the State, your Honors did hold that a tax or duty on a bill of lading, though differing in form from a tax on the articles shipped, was in substance the same thing, and was unconstitutional and void.

Fifth.—This ordinance applies to every railway which runs into the State of Alabama. It applies to every Express Company which runs into that State. I do not know how many of either there are, but the

business of the Express Company is stated in the record, to be transacted on land by means of the railways, and it may be assumed that the Express Company pays the railways therefor.

Now Congress has granted land in the State of Alabama to railway companies for the purpose of constructing their railways. It may be assumed that that purpose has been effectuated—that the railways have been constructed—and Congress has declared, that such railways shall be "public highways." Suppose that the business of this Express Company is carried on,—and there is nothing in the record which renders the suggestion improper—by means of one of these railways thus created by the bounty of Congress, and which bore the stamp on its charter, as it came from Congress, of "a public highway." Is it within the power of the City of Mobile, and of all the municipalities through which these railways pass, to place such burdens upon their business, that they shall cease to be "public highways," because the public can no longer afford to use them? Was the intention of Congress, in using the phrase "public highway," to declare that the roads should be free, and subject only to the payment of such use therefor as appertains to the use of any highway; or was it to be public only in the sense in which the State of Alabama, or its municipal organizations, would permit it to be public, viz.: upon paying trib-

ute in every locality through which the railroad passed?

But, again. Congress has recognized the railways of this country as instrumentalities of inter-state commerce, and as properly subject to control under the Constitutional grant of commercial power.

The Act of 1866, cited in the brief, was passed to obviate some such sort of objection as is now made to the ordinance in question. It is entitled "An Act to facilitate commercial, postal and military communication among the several States. Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States: Therefore, be it enacted, that every railroad company in the United States, whose road is operated by steam, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, freight and property on their way from one State to another State, and to receive compensation therefor, and to connect with the roads of other States, so as to form continuous lines for the transportation of the same to the place of destination." Now this ordinance in question assumes, that we have made that connection, because it says, "every railroad and express company whose business extends from the city of Mobile beyond the limits of the State." Inasmuch as the State of Alabama can alone create a corporation within the State of Alabama, it necessarily follows that the business conducted by the Southern Express

Company is upon a continuous line, if it extends beyond the State: that it connects with corporations doing business and operating lines of railroad communication in other States. Now, with this declaration on the part of Congress that railways, and the freight, passengers and property which they carry, are to pass continuously from State to State, (some objection to the contrary, notwithstanding, which then existed, and which does not now appear,) is it reasonable to say that this Act of Congress is to be held in subordination and subjection to the right of each municipality in the Union to forbid such transportation by taxation, which ultimately is destruction? Is it not more reasonable to say that Congress, at the time it passed this Act, had in its mind the decision of this Court, that "Congress has willed that inter-state commerce shall be free;" that this Court had said that it was "not left to each State in the Union to impose such burdens upon it as such State might see fit;" and that, in order to effectuate and give the stamp and currency of Congressional approbation to that decision, Congress said, we will take the railroads under our protection, under this grant in the commercial clause in the Constitution, and we, therefore, say that they are authorized—something to the contrary notwithstanding—to carry and to transport freight and property from State to State by continuous lines. Such a grant would fail of its purpose, fail of its intendment and of its effectuating power, if it was left to each

State and to each municipality to say, "thus far and no farther unless you pay tribute." It would seem to be insensible that New York city can say, "Connecticut cannot send her supplies to Washington unless she pays tribute for passing through the State of New York to support the municipal authority of the city of New York."

Sixth. This question was not new when the Constitution was adopted. It was a matter of dispute then, and not only so, but it evoked a manifestation of feeling on the part of those then living who were actuated on the one side by jealousy for State rights, and on the other by a desire for a Union which should be permanent. In the articles of confederation it was provided that the people of each State should have free ingress and egress to and from every other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively. That left State rights triumphant, without any power, centralized or controlling, on the part of any one to prohibit unjust legislation, assuming that such might be attempted.

It was further provided that Congress should have no right to restrict the legislative power of the States, from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.

Now how did this operate at that time? This inquiry involves a part of the political as well as of the judicial history of our country.

We are told by the reporters of those days how those provisions were considered, and Mr. Grayson said: "Under a supposition that mankind can govern themselves, I should recommend that the present confederation be amended. Give Congress the regulation of commerce."

Mr. Dawes, of Massachusetts, said: "As to commerce, it is well known that the different States now pursue different systems of duties in regard to each other. By this, and for want of just laws of prohibition through the Union, we have not secured even our own domestic traffic that passes from State to State. This is contrary to the policy of every nation on earth."

Obviously, it was the intention of the framers of the Constitution to obviate this difficulty, and as Mr. Grayson said, "to give to Congress the regulation of commerce" for the purpose, as Mr. Dawes said, "of securing our own domestic traffic in its passage from State to State;" and the question is, has that Congressional power been granted in such terms as to enable Congress to exercise it, so as to protect what, at that early day, was found to be worthy of protection, and to be suffering from the want thereof.

Your Honors will also find in the "Federalist"

the opinions of Mr. Madison and Mr. Hamilton, who endeavored to commend to the Legislatures of the several States the adoption of the Federal Constitution as proposed. Your Honors know the repute in which that publication was held at the time of its appearance, and how much it had to do with overcoming and removing the objections which were made in various portions of the Union against the adoption of the Constitution. You will find there, in language terse and classical, pictures drawn of the supposed state of facts which might arise if it was left to each State to say when goods should be admitted—for what purpose they should be admitted—upon what terms they should be admitted—and also upon what terms and at what prices they should be withdrawn. It was their object, as we are told by Mr. Madison and Mr. Hamilton, to induce the States to assent to give to Congress the right to regulate this inter-state commerce. It was their intention, and the intent of the Constitution, to regulate commerce for the benefit of a nation, not for the benefit of a State, of a county, or of a municipality, but for the benefit of a country, which, it was already seen, would eventually become one of the most populous and one of the most commercial nations of the globe. The question, therefore, which we present is simply this: was the intent with which this power was bestowed upon Congress expressed in such language that this Court, as its exponent, can say that it pre-

vents the destruction of inter-state commerce by municipal taxation? If it is properly to be thus interpreted, then we think we have presented a case calling for such interpretation, and which, if given, will result in the reversal of the judgment below.

Since the foregoing argument, the attention of counsel has been called to the cases of *The Western Union Telegraph Company vs. Atlantic, &c., Telegraph Company* (5 *Nevada Reports*, 102), and *Ex-parte Robinson* (4 *Fisher's Pat. Cas.*, 186), which are in consonance with the views herein presented.

SUPREME COURT,
UNITED STATES.

OSBORNE,
Agent Southern Express Company,
vs.
CITY OF MOBILE,

} Writ of Error to Sup. C't of Alabama.

REPORTED ARGUMENT
OF
P. PHILLIPS, Esq.,
OF COUNSEL FOR DEFENDANT IN ERROR.

Monday, 27 January, 1873.

Dec. T. 1872

HON. B. R. CURTIS,
CLARENCE SEWARD, ESQ.,
For Plaintiff in Error.

WASHINGTON:
H. POLKINHORN & CO., PRINTERS.
1873.

In the Supreme Court of the U. S.

MAY IT PLEASE YOUR HONORS:

Passing from the question of jurisdiction, and assuming that you will regard the opinion of the judge, in the Court below, as forming a legal basis for the exercise of your revisory power under the acts of 1789 and 1867, I come to the discussion of the enquiry—whether the ordinance in question which levies a license tax on all express companies and railroad corporations doing business in the city of Mobile, is in conflict with the grant of the "commercial power" and the restriction on the States as to "exports and imports."

You perceive from this statement, that we have to travel over a well worn road—one so deeply rutted that safety is to be found in keeping the track already made, and danger in trying to get out of it.

Commercial Power.

First, then, as to the commercial power. The difficulty in drawing the line accurately between this and the municipal power of the States is acknowledged. It is well stated by McLean, J. (7 How., 402.)

"No one," says he, "has yet drawn the line clearly, because, perhaps, no one can draw it between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen involving these powers, which have been decided; but a rule has necessarily

been observed as applicable to the circumstances of each case, and so must every case be adjudged.

A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessels used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet in both instances, the tax on the property in some degree affects its use.

An inquiry is made whether Congress, under 'the power to regulate commerce among the several States,' can impose a tax for the use of canals, railroads, turnpike roads and bridges, constructed by a State or its citizens? I answer, that Congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement."

The proposition I submit is this—that the grant of the commercial power does not operate *per se*, on the power of the State to tax. We shall see that this proposition is fully sustained by authority.

In the 32 No. of the Federalist it is thus stated—"I am willing to allow, in its full extent, the justness of the reasoning which requires that the States should possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants; and making this concession I affirm with the single exception of duties on imports and exports, they would under the plan of the Constitution, retain that authority, in the most absolute, and unqualified sense;

and that an attempt on the part of the General Government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article, or clause in the Constitution."

In other words, if the Constitution had contained only the commercial grant, the States would have had the power to tax "imports and exports." That they cannot now tax them is by virtue of the express prohibition to that effect.

In the case of Nathan v. Louisiana, (8 How.,) the tax was laid on exchange brokers, and it was challenged on the ground that the party bought and sold alone, foreign bills of exchange, and that the tax therefore interfered with the power to regulate commerce. But the Court said—

"This is not a tax on bills of exchange; under the law every person is free to buy or sell bills of exchange as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

The right of a State to tax its own citizens for the prosecution of any particular business or profession, within the State, has not been doubted. And we find that in every State money or exchange brokers, vendors of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law are taxed.

As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so in a bill of exchange: and upon this ground it is insisted that a tax upon an

exchange broker is a tax upon the instruments of commerce.

What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vendor of these products exempted from State taxation because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship-building the same as the exercise of any mechanical art? And also the traffic of ship-chandlers, and others, who furnish the cargo of the ship? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business within the States, on the ground that the products sold may be used in commerce."

The grant of the commercial power does not prohibit the exercise of State power acting within its own jurisdiction when it is not in conflict with any act of Congress warranted by the grant.

This subject has been fully considered by that eminent and lamented Chief Justice whose fame is ever present in this chamber, though his marble bust be absent from its appropriate place.

In the license cases, he says, (5 How, 578–9) speaking of the laws of New Hampshire:

"This law acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the General Government, and subject to its control and regulation."

The Court will note how definitely the case is put, and how broad is the statement of the proposition.

What says this eminent judge as to the validity of the act in question?

"The question therefore brought up for decision is whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States and renders all State law upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the Court in Brown v. The State of Maryland. I proceed therefore to state my opinion upon it."

Adverting then to the division of opinion among the judges on this question, he says—

"It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this Court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the General Government cannot upon any just principles of construction be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet in my judgment the State may nevertheless for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such

regulations are valid unless they come in conflict with a law of Congress. Such, evidently, I think was the construction which the Constitution universaly received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this Court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States."

Again, "If the mere grant of power to the General Government was in itself a prohibition of the States, there would seem to be no necessity for providing for the supremacy of the laws of Congress as all State law upon the subject would be *ipso facto* void, and there could therefore be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation."

In many of the decisions, State Statutes have been upheld on the ground that they fell within what is termed the *police power*. In most of the cases they related to laws regulating the health and morals of the community.

But what is the police power? I find no such term in the Constitution of the United States. We know what are granted powers and what are reserved powers. The Constitution tells us—"the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."—This is a clear definition, in which this expression of police power finds no place.

The police power then, when named in the decisions must be held to be the exact equivalent of the reserved rights of the States. It cannot be more nor can it be less than this.

This I submit is borne out by what the Chief Justice says at p. 585 of the same case.

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say the power of sovereignty, the power to govern men and things within the limits of its dominion."

After an elaborate review of the previous adjudications, he thus continues:

"In referring to the opinions of those who sat before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the Constitution of of the United States; where from the great public interest which must always be involved in such questions this Court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. *And I am not aware of any instance in which the Court have spoken of the grant of power to the General Government, as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress, and a State law came in conflict with it.*

The opinion thus concludes:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment a valid one. For although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among

the several States, yet as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

Two years after the discussion of the "License Cases," the "Passenger Cases" were brought before the Court. I cite these particularly, because the questions now presented, were most elaborately considered in separate opinions delivered by the judges.

In these latter cases, (reported in 7 How.) the same learned judge, after recurring to the fact, that in the former cases five of the judges had concurred in his opinion, refers to the 32d No. of the Federalist, which I have already cited, as strengthing the argument. He then says—p. 479,—

"But I proceed to enquire whether if the law of Massachusetts be a tax, it is not a legitimate exercise of it's taxing power, putting aside for the present the other considerations hereinbefore mentioned, and which, I think, amply sufficient to maintain its validity.

Undoubtedly the ship, although engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to the general government; and I assent fully to the doctrine upon that subject laid down in the case of Gibbons vs. Ogden. But it has always been held that the power to regulate commerce does not give to Congress the power to tax it, nor prohibit the States from taxing it in their own States, and within their own jurisdiction. The authority of Congress to lay taxes upon it, is derived from the express grant of power, in the eighth section of the 1st article, to lay and collect taxes, duties imposts, and excises, and the

inability of the States to tax it, arises from the express prohibition contained in the tenth section of the same article.

This was the construction of the Constitution at the time of its adoption; the construction under which the people of the States adopted it, and which has been affirmed in the clearest terms by the decision of this Court.

The grant of the power to regulate commerce, therefore, did not in the opinion of Mr. Hamilton, Mr. Madison, and Mr. Jay, prohibit the States from laying imposts and duties upon imports brought into their own territories. It did not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the regulation of commerce; and the right of taxation in the States remaining over every subject where it before existed, with the exception only of those expressly prohibited.

This construction, as given by the Federalist, was recognized as the true one, and affirmed by this Court, in the case of Gibbons vs. Ogden, 9 Wheat, 201. The passage upon this subject is so clear and forcible, that I quote the words used in the opinion of the Court, which was delivered by Chief Justice Marshall.

"In a separate clause," he says, "of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution then considers those powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; *and they might, consequently,*

have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition upon the subject." * *

Pursuing the argument still further, he says, at p. 480,

"With such authorities to support me, so clearly and explicitly stating the doctrine, it cannot be necessary to pursue the argument further. I may therefore safely assume that according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States; and they would at this day have the right *to tax the merchandise brought into their ports and harbours by the authority and under the regulations of Congress, had they not been expressly prohibited.*

They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necesary for executing their inspection laws, and also from laying any tonnage duty. *So far* their taxing power over commerce is restrained, but *no farther.* They retain all the rest, and if the money demanded is a *tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports, or a tonnage duty.*"

These opinions were delivered in 1849, and the argument on which they are based has not been shaken by any subsequent adjudication of this Court. On the contrary, they find support in the decision of Crandal vs. State of Nevada, decided in 1867, in which was brought in question the validity of an act taxing the carrier of passengers at so much per head. To the argument that this tax was void as being a regulation of commerce, the Court say, (p. 43, 6 How.)—

"It may be that under the power to regulate commerce among the States, Congress has authority to pass laws,

the operation of which would be inconsistent with the tax imposed by the State of Nevada, but we know of no such statute now in existence. Inasmuch therefore as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country it is not easy to maintain in view of the principles on which those cases were decided, that it violates the clause of the Federal Constitution which we have had under review."

The principal cases thus referred to are Cooley v. Board of Wardens, in which the act of the State, regulates pilots, and Gilman v. Philadelphia, where the act authorized the erection of a bridge which impeded navigation. In both cases the acts were upheld because they were not in conflict with any act of Congress.

So also in the case of Lane v. Oregon (7 Wall, 77,) it is held that while the States are prohibited from taxing exports or imports, that as to "property *business* and persons within their respective limits their power of taxation remained, and remains entire—"That there is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by the National Government, To the extent indicated, it is as complete in the States as the like power within the limits of the Constitution is complete in Congress."

I have thus, as your Honors perceive, used the arguments to be found in the reports, and cited them at unusual length rather than occupy your attention with argument of my own. When the Caliph Omar carried his victorious banners into the ancient city of Alexandria, he gave its splendid library to the flames, saying, that whatever was useful to know was to be found in the Koran I may properly apply this remark to the discussions on this subject found in the Reports.

On these discussions I am content to rely for the vindication of the proposition, that the ordinance in question cannot be held invalid by reason of the grant of the commercial power.

Acts of Congress.

The learned gentleman who opened the cause, (Mr. Seward,) impliedly admits this when he seeks to maintain that the ordinance is void because it conflicts with acts of Congress. If he can show this there will be nothing further to argue, for acts of Congress passed in pursuance of the Constitution are the supreme law of the land.

The acts relied on are those donating lands to the State to aid in the construction of railroads, which roads are said to be used by the appellant in carrying on the express business.

We are also referred to the act of 1866, (14 Stat., 66.)

It would be a sufficient answer to say, that these acts were never presented to the consideration of the Supreme Court of the State, and therefore never entered into the judgment rendered. As no such question was considered—the judgment could not be reversed on this ground.

But admitting that this is a subject proper to be considered by the Court, it certainly can require no argument to show that if the State possessed the power to levy this tax prior to these acts of donation, they were not stript of the power either by their passage or their acceptance by the State.

Land donations for public improvements are not made in the exercise of the power "to regulate commerce," but rest on the power "to dispose of and make needful rules

respecting the territory or other property belonging to the United States." As the greatest landed proprietor in the Union the government finds an equivalent for such donations in the enhanced value of the lands retained.

The argument based on these acts would produce the anomaly that the ordinance in Alabama would be held unconstitutional while a similar ordinance in Massachusetts would be held valid. There can be no such inequality under the Constitution—the rights and obligations of the States, are measured by one and the same rule.

Then as to the act of 1866. This is to be found quoted in the brief of Messrs Curtis and Seward, at p. 22. I should really be indebted to any one who could give its history, for a more extraordinary piece of legislation I have never read. Thus it runs—

"Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce,"

Therefore be it enacted.

Hear how it thunders in the prologue? Therefore be it enacted. We are now prepared for some regulation of commerce under the power so solemnly set forth. But what do we have as the consequence of this "*therefore.*" It is this and nothing more—that "every railroad operated by steam, is hereby authorized to carry passengers, freight, &c., and to receive compensation therefor, and to connect with other roads, &c."

This is putting the mountain in labor for a most ridiculous result. These roads hold their charters from the States; they are organised to carry freight and passengers, and are authorized to receive compensation for so doing. All their rights and obligations rest upon these charters. The declaration, therefore, contained in this

act is mere *brutum fulmen*. It neither adds to rights, nor in any manner interferes with them, as held by the State charters

I therefore submit that the ordinance in question, taxing the business of express companies and rail roads, is not in opposition to the Constitutional provision as to commerce, and that there is no act of Congress with which it conflicts.

Exports and Imports.

We come now to the second objection that the tax in question is a duty on exports or imports, "and thus within the prohibition of the Constitution.

This question was presented in the celebrated case of Brown v. Maryland (12 Wheat) which constitutes the great store house from which weapons of offense and defense for carrying on the conflict between the advocates of reserved rights and granted powers, have been drawn.

Chief Justice Marshal in speaking of the difficulty of giving any rule of division which would be applicable to all cases, thus expresses himself in reference to an act which directly taxed the importer of foreign merchandise for the privilege of selling goods which he had imported under the authority of an act of Congress. It is therefore to be remembered, that the question was as to foreign importations, and whether the law of the State conflicted with an act of Congress.

"It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States,

must always be taken in view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in confiict with their acknowledged power to tax persons and property within their territory. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision when marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application."

Your Honors will now mark how cautiously, and circumstantially the Chief Justice defines the rule which was to be applied to the case before him.

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; *but while remaining the property of the importer, in his warehouse, in*

the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

Brown had purchased the right to import these goods from the general government, by paying the duties required by the act of Congress. The law of the State taxed him for the privilege of selling them; and what the Court decided is, that the right conferred by the act of Congress to import the goods, carried necessarily the right to sell them, (under the limitations expresssed) and that the State tax was therefore in conflict with it.

It is argued on the other side, that this decision shows the invalidity of the ordinance in question. But it is submitted that the two cases are wholly unlike.

The ordinance neither taxes imports nor exports. It makes no reference to the importer or exporter. It is said, however, that the tax may act indirectly on the cost of the article thus carried by requiring a tax from the carrier, and thus become a tax on exports and imports. This is predicated upon the business of the Express Company which uses the railroads of the States as it is said in "the transportation of freights and articles of commerce between different States, as well as goods and merchandise imported from foreign countries and exported to them. Also including the transportation of such articles imported in the original packages, if so offered, whether between points in the State or beyond it."

This is the agreed statement upon which the question is to be decided, and it will at once be seen that the exemption of the Express Company is claimed upon the ground that its business consists in carrying goods received from other States as well as foreign countries.

Then, first, as to the exemption on the ground of carrying goods imported or exported from other States. I

show to this Court that such goods are not exports or imports in the constitutional sense, described in the prohibition and exempted from State taxation.

Mr. CURTIS. Mr. Phillips you need not trouble yourself to argue that particular question. So far as this business extended between the States, so far it was inter-State commerce. So far as it is foreign commerce I shall insist it comes within the prohibition.

Mr. PHILLIPS. This admission is properly made, for this Court has determined in the case of Woodruff v. Parham, (8 Wall.,) that "imports" as used in the prohibition has reference only to goods brought from foreign countries.

Mr. CURTIS. That is so.

Mr. PHILLIPS. The word exports upon the same principles must refer to goods sent to foreign countries?

Mr. CURTIS. I suppose so.

Mr. PHILLIPS. Well, then, we can eliminate from the case all that concerns this character of goods, and we have left only what is said as to the carriage of foreign goods. Let us repeat what is said as to this latter class. The company was engaged "in transporting merchandise *imported* from foreign countries and *exported* to them."

First, as to merchandise *imported*. The power of the State to tax even directly "merchandise imported" has never been denied. The decision of Brown v. Maryland, restricts the power only where the goods are in the hands of the importer in their original package, and in his warehouse.

The exemption is confined to the importer himself. As soon as he sells or disposes of the goods, they become part and parcel of the property of the State and subject to its taxation. They have lost their character of foreign goods—they are no longer imports.

The agreed statement does not show that the Company was the agent of the importer himself for the transportation of the goods; *non constat*, they may have changed owners a dozen times.

But suppose it was the agent: has the importer acquired under any act of Congress the right to use the railroads and vessels of the country for the transportation of his goods from port to port and from place to place, and claim that the agencies he thus employs shall be exempt from taxation on the business of transporting, because, forsooth, such a tax on these instrumentalities might effect the cost of transportation.

It has been over and over again decided—that vessels and other vehicles of commerce were taxable. Certainly a tax of this kind effects the price of carriage. What dinstinction is to be drawn between a tax on the road or vessel carrying merchandise and a tax on the business?

We have now left only what is said as to exports, and we repeat the statement that the Company was engaged in transporting goods "imported from foreign countries, *and exported to them.*"

The Company did not certainly carry goods that were not in the country to be carried. If they were already "exported" it could not be engaged in their transportation. The meaning, I presume, of this statement is—that it was engaged in transporting goods *intended to be exported.*

Now, goods intended to be exported are not exempt. All the produce of the State is subject to taxation whether destined for exportation or otherwise. The mere intention does not destroy the power. The State may levy a tax on the cotton produced within its borders, though it may

be well known that the larger portion, if not all, would be exported to foreign countries.

Such a tax is not a tax on exportation. The act in question in taxing this Company does not deal with it in any sense as an exporter of goods—and to denominate such a tax as "an impost or duty on exports" is to confound the meaning of words, and wholly to ignore the plain meaning and design of the law.

MR. JUSTICE BRADLEY. Your position, I take it, is that an exportation can only be from a *port*; an importation to a *port*.

MR. PHILLIPS. That is certainly the literal interpretation;—how far this may differ from its legal interpretation, I am not now prepared to answer.

The tax, as your Honors will perceive, makes no discrimination against the plaintiff in error; it falls alike upon all corporations—foreign or domestic. The license is regulated upon equitable principles, and graduated according to the estimated amount of business transacted in the city. The Company, like the railroads which it uses, may be instrumentalities by which commerce is carried on. But this is no ground of exemption. (Nathan vs. Louisiana, *supra.*)

Even were it a discriminating tax against this foreign corporation, it would not on that ground be held invalid. Incorporated by Georgia, it possessed no extra territorial privileges. When it enters Alabama, it does so with the knowledge that the law imposed this tax upon the business. It transacted that business under an implied contract with the State to pay the tax. This is one of the grounds of decision in, Pennsylvania Railroad Company v. Commonwealth, (3 Grant, 129) in which Mr. Justice Strong concurred. The other ground being, that a tax on railroads at so much per ton on freight

carried, was not a duty on "exports or imports," but a tax on business measured by its magnitude.

MR. JUSTICE STRONG. Who wrote the opinion?

MR. PHILLIPS. Lowry—Chief Justice. I find however in the opening of the volume that Woodward is styled Chief Justice.

MR. JUSTICE STRONG. Woodward succeeded Lowry.

I have said that foreign corporations may be discriminated against, and I cite the authorities to this point without pausing to comment on them.

Paul v. Virginia 8, Wall 181.

Ducat v. Chicago 10 " 415.

Att'y Genl. v. Bay Co., 99, Mass. 148.

Tatem v. Wright 3, Lab,—429.

Slaughter case 13, Grat. 767.

The business in question differs but little from that of an Insurance Company—The Express creates no means of transportation. It uses those already created by the State. It receives a premium over and above the ordinary railroad rate, as an insurance for the safe delivery of the parcels intrusted to its care. I say *parcels*,—for its business does not include the transportation of merchandise in large quantities. A leg of venison, a wild turkey, a barrel of oysters, a bundle of photographs, articles of furniture: these better denote the nature of its business, than the description which connects it with the foreign commerce of the country.

In opposition to all these authorities, my learned brothers mainly rely on the case of Erie Railway v. State, 31, N. J. The tax in that case imposed only on foreign corporations three cents a passenger and two cents a ton, on merchandise *passing through the State.*

This tax was held invalid by reason of the discrimination. In doing this, the Court cautiously guarded itself by saying—"It is admitted that the State may impose a tax which incidentally affects commerce. Indeed it is impossible to imagine any tax which in theory may not be said to have in the distance such effects. the tax imposed, must, to avoid the taint of unconstitutionality, be indirect in substance, and not merely so in form."

In the late case of Commonwealth v. Phil. & R. R. C., 62, Penn., there is an elaborate review of all the decisions, including the New Jersey case, which is viewed as I have stated it, as turning on the point of discrimination. Your Honors will note that the tax of Pennsylvania was so much a ton on freight carried through the State, as well as on that delivered in the State. The tax was maintained as constitutional by all the judges but one. The grounds of Judge Reed's dissent are not stated. I will read a passage from the opinion of the Court:

"The act we are now considering is in no sense a regulation of commerce. It is the lawful exercise of State power over creations and uses brought into existence by her own authority; a proper tax upon the use of the franchises granted by her for the benefit of all alike who employ them, and in consideration of valuable privileges and faculties furnished to them by her authority and permission. The subject is wholly internal and the imposition equal in its operation, and equitable in its distribution; while to exempt freight passing out or coming into the State from its operation would be unjust discrimination against our own citizens and in favor of the citizens of other States. The case is not rested on the debatable ground of State power to regulate inter-State commerce in the absence of congressional legislation on the same subject, but on the admitted right of a

State to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to legislate and tax their use by those who choose to employ them, as undoubted subjects of her domestic affairs, and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power to the injury of the citizens of other States."

MR. JUSTICE BRADLEY. Is the case you refer to one of the railroad cases now on the docket on writ of error?

Mr. PHILLIPS. I do not know; when this morning I handed my friend, Mr. Seward, a note of this case, as it was not referred to in my brief—he said: "Why that is the very case that is now in this Court."

Mr. SEWARD. Mr. Brewster, the Attorney General, so informed me.

Mr. PHILLIPS. In my brief I expressed the suspicion that there was lurking behind the case of the Express Company the greater case of the railroads. That suspicion it now appears is a reality.

It is evident then that the questions at issue involve something more than the claim of this Express Company. The argument which carries its exemption covers all the railroads of the States. Further than this, if the State cannot tax this Georgia company then it cannot tax the corporations created by itself, even though the right to tax was reserved in the charter, and constituted a condition of the grant.

This company was organized in Georgia, under a law which provided, that "every express company doing business in this State shall pay a tax of one per cent. upon the gross amount of their profits for each year on business done at its office in the State." (Code of Geo., § 751.)

Mr. CURTIS. Is that in your brief?

Mr. PHILLIPS. I think so.

Now, if the difference in the form of this tax from the one in question works no legal distinction, and it seems to me it does not, the company could equally as well have re-resisted it in that State. The Georgia Courts would have been the appropriate tribunal to pass upon the question. It seems, however, for some reason, that the Courts of that State have been avoided. We find this company going into South Carolina, where the taxation was very similar to that of Georgia. It there resisted the tax, but it was sustained by the Supreme Court of that State, in an able opinion by Chief Justice Dunkin, a man whose ability did honor to the State at a time when it was an honor to be one of its citizens. (15 Rich., 66.)

We may add to the list of citations the recent case of Ward v. Maryland, (12 Wall., 432,) where the question was as to validity of a tax on the business of selling by samples. The opinion in that case elaborately examines the act to show that it was a discriminating tax, and, therefore void—but there is the strongest implication that if it had not been, the act would have been upheld. I am sustained in this view, by the remarks of Mr. Justice Bradley, appended to the opinion.

MR. JUSTICE CLIFFORD. I do not think that the Court intended to do more than to pass on the question of discrimination.

MR. PHILLIPS. I will not press that matter, though I think the interpretation I have given is a fair one.

I think I have satisfactorily answered the objection, that the tax in question was in conflict with the acts of Congress referred to. I now desire to call your attention

to the acts of Congress relating to the very matter, and distinctly recognizing the right of the State to tax the business of these corporations.

The act of 1864, (13 Stat.,) after providing for licenses to carry on business, declares, in sec. 78, p. 250, that such license shall not exempt the party from the control of the State, "nor shall such license be held or construed *to prevent or prohibit any State from placing a duty or tax for State or other purposes, on any trade, business, or profession for which a license is required by this act.*"

Again, in the 50 section of the act of 1866, (14 Stat., 121,) Congress imposes a tax *inter alia* on Companies "doing an express business as well as on all others carrying articles for pay," exempting "draymen and teamsters owning only one dray or team," with this proviso, (p. 122,) that the payment of any tax imposed by law shall not be held or construed to prohibit the State from taxing "any trade, business, or profession," &c.

Undoubtedly Congress could not confer on the States a right of taxation, which the Constitition prohibits. But when the question concerns the commercial power, the regulation of which is to be found in its acts, then the statutes referred to assert in strongest language, that State power may be exerted without the possibility of conflict.

We have seen that Congress in levying its taxes, places express companies in the same category as draymen and teamsters. They are all alike engaged in transporting articles, and the argument for exemption now urged for the express company is equally applicable to the others. In this case the company admits that it is liable to pay and does pay a license tax for the drays used in making the connection between the roads and

vessels. That a dray is used as a portion of the line over which the transportation is made, does not vary its character as common carrier or change its liability. The thing thus carried is as much an export or import while on the dray, as it is when it is put on the rail car. Commerce is as much concerned when the dray is transporting the article as when the same operation is effected by the railroad. All the reasoning which applies to the exemption of one of the means applies with like force to all the means employed in the service of commerce.

The principles which must determine this case are cleary announced by Mr. Justice Clifford in the cases of

Society of Savings v. Coit, and
Providence Institution v. Mass.. 6 Wall, at p. 623.

1. Private corporations, and all trades and avocations by which the citizen acquires a livelihood may be taxed by the State for the support of the State Government.

2. That such authority resides in the State, independent of the Federal Government, and that it is wholly unaffected by the fact, that the party, whether corporation or individuals, has or has not, made investments in Federal securities.

3. That the power rests in the discretion of the Legislature to decide whether the sum to be levied, shall be a fixed one, and if not, to determine, in what manner and by what means the amount shall be determined.

MAY IT PLEASE YOUR HONORS:—

I have discussed this case with earnestness, because of its great importance and far reaching consequences; and also because I know that I am to be followed by a gentleman whose learning once adorned this bench, and now places him in the highest position at the bar.

Whatever refinement of reasoning can effect to undermine the foundation of the argument I have addressed to the Court, will doubtless be used with his characteristic force. Nevertheless, I place my trust in that wise discrimination which has ever characterised the decisions of this high tribunal, for the preservation of the power of taxation so vital to the existence of the States, against overstrained argument, and logical subtleties. Behind this case we are now informed is the question of State power over the great railroads whose giant arms embrace our whole vast territory, and whose enormous and consolidated capital already sways legislators and I may add legislatures

Now the enquiry is—Is there any thing in the business of these great corporations, which interposes the shield of the Federal Constitution, between them and State taxation? Is it true that the States have the power to charter them, but, are powerless to tax their business when chartered? Are we thus presented with the paradox of a creature independent of his creator?

These are the questions which are now addressed to your mature consideration, and to that, I submit this cause, feeling confident that in your examination of the ordinance now assailed, you will find nothing which either directly or indirectly trenches upon any grant in the Federal Constitution, or falls within any of its prohibitions.